No. 93-1797

(5)

Supreme Court, U.S.
FILED
JUN 10 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

v.

MORTON INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENT MORTON'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE F. KUGLER, JR.
Counsel of Record
EDWARD C. LAIRD
ELLIS I. MEDOWAY
ARCHER & GREINER,
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, New Jersey 08033
(609) 795-2121

Of Counsel:
THOMAS C. HILL
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

Attorneys for Respondent Morton International, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should a petition for a writ of certiorari challenging the New Jersey Supreme Court's decision as violative of Due Process be granted when the Petitioners prevailed below, the state supreme court provided them an opportunity to be heard, and the court's decision bound the Petitioners to their representations filed with the state regulatory agency responsible for approving the so-called "pollution exclusion clause" for use in their private contracts of insurance?

2. Should a petition for a writ of certiorari be granted on the grounds that the decision below conflicts with holdings of this Court under the Due Process Clause?

RULE 29.1 STATEMENT

The subsidiaries (other than wholly-owned subsidiaries) of Respondent Morton International, Inc. are listed below:

(a) Morton Nichiyu Co., Ltd.

(b) Morton Yokohama, Inc.

(c) Nippon-Bee Chemical Co., Ltd.

(d) Toyo-Morton, Limited

(e) Ecuatoriana, de Sal y Productos Quimicos C.A.

(f) Morsecor, C.A.

(g) Dr. Renger G.m.b.H. & Co., K.G.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISION INVOLVED 1

COUNTERSTATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 10

1. Petitioners Were Not Denied Due Process of Law 10

2. There Are No Special Or Important Reasons That Exist For Granting Certiorari Because The Decision Below Does Not Conflict With The Holdings Of This Court In *Ohio Bell Tel. Co. v. Public Utils. Comm'n* and *Saunders v. Shaw* 17

a. *Saunders* 18

b. *Ohio Bell* 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Borden, Inc. v. Affiliated F&M Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989) 9

Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987) 3, 11, 12

Broderick Ins. Co. v. Hartford Acc. & Indem. Co., 954 F.2d 601 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 189 (1992) 9

Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989) 8

Continental Insurance Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988) 9

Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) 9

Fuentes v. Shevin, 407 U.S. 67 (1972) 10

Huddleston v. Dwyer, 322 U.S. 232 (1944) 8

Hybud Equip. Corp. v. Sphers Drake Ins. Co., Ltd., 64 Ohio St. 3d 657, 597 N.E. 2d 1096 (Ohio, 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1585 (1993) 8

Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) 9

Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co., 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982) 3

TABLE OF AUTHORITIES – Continued

Page

Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 187 W.Va. 742, 421 S.E.2d 493 (1992) ..... *passim*

Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570 (1990) 8

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982) 10, 12

Lansco, Inc. v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (Law Div. 1975), *aff'd o.b.*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977) 3

Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) 9

Matthews v. Eldridge, 424 U.S. 319 (1976) 10, 12

Morton International, Inc. v. General Accident Insurance Company, 134 N.J. 1, 629 A.2d 831 (1993) 2, 3, 8, 11, 13

N.J. Turnpike Authority v. Sisselman, 106 N.J. Super. 358, 255 A.2d 810 (App. Div. 1969), *certif. denied*, 54 N.J. 565, 258 A.2d 16 (1969) 16

Nero v. Hyland, 76 N.J. 213, 386 A.2d 846 (1978) 16

New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) 8

Ohio Bell Tel. Co. v. Public Utils. Comm'n., 301 U.S. 292 (1937) 17, 18, 19, 20, 21, 22

Pascucci v. Vaggott, 71 N.J. 40, 362 A.2d 566 (1976) 16

Public Service Comm'n v. Brashear Freight Liners, Inc., 306 U.S. 204 (1939) 10

Saunders v. Shaw, 244 U.S. 317 (1917) 17, 18, 19, 22

TABLE OF AUTHORITIES – Continued

Page

Shelly v. Kraemer, 334 U.S. 1 (1948) 11

Tonka Corp. v. Bituminous Cas. Corp., 9 F.3d 51 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3750 (1994) 8

CONSTITUTION

Constitution of the United States, Fourteenth Amendment 1, 11

STATUTE

Superfund Reform Act of 1994, Title VIII; S. 1834, H.R. 3800 22

RULES

Sup. Ct. R. 10 17

Sup. Ct. R. 10.1(c) 18

N.J. Court Rule 2:2-3(a)(2) 16

N.J. Court Rule 2:5-4 16

No. 93-1797

In The

Supreme Court of the United States

October Term, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

v.

MORTON INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of New Jersey

RESPONDENT MORTON'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Morton International, Inc. ("Morton") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the New Jersey Supreme Court's decision below.

CONSTITUTIONAL PROVISION INVOLVED

This case presents no basis for raising a claim under the Fourteenth Amendment to the United States Constitution that would warrant this Court's exercise of jurisdiction.

COUNTERSTATEMENT OF THE CASE

On July 21, 1993, the New Jersey Supreme Court rendered its long-awaited decision on New Jersey environmental insurance coverage in *Morton International, Inc. v. General Accident Insurance Company*, 134 N.J. 1, 629 A.2d 831 (1993) (Petitioners' Appendix ("P.App.") 1a-113a). The decision ended seven years of insurance coverage litigation and resulted in a determination that the Petitioners and other carriers owed no duty of defense or indemnification to their insured, Morton. This 96-page unanimous decision was issued after oral argument and after consideration of numerous briefs and thousands of pages of record material submitted by all parties and *amici*.

The state court's opinion devoted its analysis and attention to numerous environmental insurance coverage issues that have plagued the courts throughout the country. The court resolved such state contract-law issues as the meaning of the "occurrence clause," the meaning of "damages," the definition of "accident," the application of the "duty to defend" and the interpretation of the "pollution exclusion clause."

While holding for the carriers on the pollution exclusion clause and deciding that Morton was not entitled to coverage for indemnity or defense, the court also determined that the Petitioners had grossly misrepresented to New Jersey regulators the true intended purpose of that exclusionary clause. Consequently, the court held the carriers bound to their representations and only permitted enforcement of the clause as limited to those representations. Even this decision, however, expanded the

numbers and types of cases in which the carriers could assert that the clause barred coverage.[1]

Contrary to the assertions made by Petitioners in their Brief before this Court, the New Jersey Supreme Court did not invoke the theory of estoppel *"sua sponte."* This theory was specifically acknowledged by Petitioners in their brief filed with the New Jersey Supreme Court on June 29, 1992. In that brief, Petitioners stated in reference to the then-recent West Virginia Supreme Court of Appeals decision in *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 187 W.Va. 742, 421 S.E.2d 493 (1992), and the New Jersey Appellate Division decision in *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), that those cases suggest

---

[1] Prior to the *Morton* decision, the lower courts in New Jersey had for many years construed the pollution exclusion clause to be ambiguous and co-extensive with the "occurrence" provision. *See, e.g., Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987); *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982); *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Law Div. 1975), *aff'd o.b.*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977). Under this line of cases, an insured was entitled to coverage if it could be shown that the resulting *damage* was not "expected or intended." The *Morton* decision modified *Broadwell* by construing the pollution exclusion clause to provide coverage identical with that provided under the prior occurrence-based policy, except that the clause was interpreted to bar coverage in those cases where the *"insured* intentionally *discharges* a known pollutant." 134 N.J. at 78, 629 A.2d at 875 (emphasis in original and supplied).

> the proponents of the pollution exclusion are *estopped* from giving any real effect to the pollution exclusion because of one construction of certain isolated statements in the [IRB] memorandum that was submitted in most jurisdictions. [Respondent Morton's Appendix ("R.App.") 64a; emphasis added].

In *Joy Technologies*, the West Virginia Supreme Court of Appeals applied the principle of judicial or regulatory estoppel to Liberty Mutual (one of the Petitioners here), stating:

> Certainly, in this Court's view, an essential part of the public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that foreign corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies. [187 W. Va. at 746, 421 S.E.2d at 497].

In response to that decision, carrier *amicus* Aetna Casualty & Surety Company ("Aetna") moved on June 25, 1992 to expand the record before the New Jersey Supreme Court, proposing to add in excess of 1,500 additional pages of regulatory and drafting history relating to the pollution exclusion clause (R.App. 8a-42a). Petitioners Insurance Company of North America ("INA") and American Home Assurance Company ("American Home"), together with Respondents Underwriters at Lloyd's, London, and Certain Subscribing London Market Insurance Companies ("Lloyd's"), joined Aetna's successful motion to expand the record (R.App. 66a-69a) and in

so doing adopted Aetna's submission that included, among other things, the following sworn statement:

> Aetna submits it is in a unique position to brief on behalf of insurers the drafting and regulatory history of those policy provisions and the way they were understood by policyholders. Its counsel herein have devoted many hundreds of hours researching, analyzing and compiling thousands of documents on this subject from the files of the Insurance Service Office, insurance brokers, state insurance commissioners, policyholder's insurance and manufacturing trade associations, the federal Environmental Protection Agency, and publicly available insurance materials. . . .
>
> At the risk of being presumptuous, and based upon the fact that Aetna is not aware that any other carrier has ever presented this evidence to courts, it is believed that Aetna and counsel herein are the only ones in the country who have developed the wealth of industry-wide information and data Aetna proposes to make available in this briefing. Indeed, other insurers opposed Aetna's efforts, asserting that it is never necessary to go beyond plain policy language and resort to extrinsic evidence. [R.App. 6a-7a].

Aetna further explained in its supporting brief that it had

> compiled a full history demonstrating the true import and complete context of such extrinsic evidence. To the best of Aetna's knowledge, it has never before been presented to any state Appellate or Supreme Court. [R.App. 42a].

This motion to expand the record, along with the *Joy Technologies* decision rendered by the West Virginia high court, prompted additional efforts to expand the record before the New Jersey Supreme Court, including the New Jersey Attorney General's motion to place the full New Jersey regulatory filings before the court. In its *amicus* brief, the Attorney General again placed the estoppel issue in front of all parties when he argued that the court should "bind" the insurance industry to its representations made in the early 1970s to state regulators when seeking approval of the pollution exclusion clause in private insurance contracts (R.App. 77a-78a).

Petitioners' complaint that Morton and *amici* did not argue the estoppel issue is another mischaracterization of the record. Both policyholder *Amici* New Jersey League of Municipalities ("League") and Allied-Signal group ("Allied") specifically identified the issue in their briefs filed in late June, 1992. The League, relying on *Joy Technologies*, stated:

> Similarly, Liberty Mutual and the other insurance companies that took part in the filings submitted to New Jersey *or* West Virginia should be estopped from taking a position here that is inconsistent with these prior representations made to the commissioners that the "exclusion was a mere clarification of existing coverage." [R.App. 59a; emphasis in original].

Allied likewise argued:

> The West Virginia Supreme Court of Appeals has just reminded us that no more than anyone else are insurers allowed to escape the force of

> "studied, unambiguous, official and affirmative" representations on which they mean public authorities to rely. [R.App. 56a].

Morton argued to the trial court that the regulatory filings of the carriers were critical to the outcome of the case (R.App. 1a-2a). The precise IRB explanatory memorandum that accompanied the carriers' regulatory filing nationwide was placed in the trial record in 1987 by Morton and was specifically relied upon as evidence of what Morton argued, at that time, was ambiguous language contained in the insurance policies (R.App. 3a-5a). This is the same explanatory memorandum that has been the critical document analyzed by courts nationwide including the trial, intermediate appellate and supreme court in this case.

Morton consistently argued below that the ambiguous policy language should be construed in accordance with the regulatory representations made by the carriers (R.App. 1a-5a; 47a-52a). The two lower state courts agreed with that argument. The New Jersey Supreme Court concluded that the exclusionary language was not ambiguous but could not be enforced because of the regulatory representations made by the carriers. Thus, either way, Morton's argument that the carriers' 1970-71 regulatory filings should prevail over their present interpretation was accepted at each judicial level in this case.

Petitioners cannot have it both ways. They actively supported and adopted the above statements made by Aetna in seeking to expand the record before the New Jersey Supreme Court and were ultimately successful in doing so. They were clearly made aware of the critical nature of the regulatory representations from the very

beginning of the case, and the issue of estoppel was most specifically brought home to them by cases outside the jurisdiction as well as the briefs filed in *Morton*.[2]

Petitioners' argument is also undermined by the supreme court's ruling to further expand the record to include additional (in excess of 40) affidavits filed in support of Petitioners' motion for reconsideration and modification of the supreme court's decision. While accepting the affidavits and considering additional briefs of Petitioners, the court nevertheless declined to modify its decision (*See* P.App. 202a; 232a-248a; Petitioners' Brief ("P.B.") at p. 11, n. 14). This case thus simply fails to provide a basis to deviate from this Court's long-standing policy of denying certiorari in cases which fundamentally involve issues of state law and private contracts.[3]

---

[2] The regulatory history of the pollution exclusion clause was significantly relied upon by other courts prior to the decision in *Joy Technologies. See, e.g., Just v. Land Reclamation, Ltd.*, 155 Wis.2d 737, 456 N.W.2d 570, 574-75 (1990); *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 689 (1989); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1197-98 (3d Cir. 1991).

[3] This Court has stressed that the "decisions of the highest court of a state on matters of state law are in general conclusive upon us . . . ." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). Guided by this long-standing principle, this Court has consistently denied certiorari in cases involving insurance coverage disputes, including environmental matters, the resolution of which is governed by state law. Indeed, carriers, including some of the Petitioners herein, have argued this point to this Court in opposing petitions of this very nature in the past. *See, e.g., Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St. 3d 657, 597 N.E. 2d 1096 (Ohio, 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1585 (1993); *Tonka Corp. v. Bituminous Cas. Corp.*, 9 F.3d 51

In addition, Petitioners argue that the concept of "equitable" estoppel requires a plenary hearing and proofs of various elements including reliance by the affected parties. In so arguing, Petitioners ignore the import of what the New Jersey Supreme Court did. The state court's decision is predicated upon the concept of "regulatory" estoppel; the court bound the insurance industry to the representations it made in 1970-71 to New Jersey regulatory authorities with respect to the alleged meaning of the pollution exclusion clause which was ultimately approved on the basis of those representations. This state-law principle means that if you are in a regulated industry and you make representations to those charged with the responsibility of administering and overseeing that public process, the New Jersey Supreme Court will hold you to those representations.

(8th Cir. 1993), *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3750, 3754 (1994); *Broderick Ins. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 189 (1992); *Continental Insurance Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Borden, Inc. v. Affiliated F&M Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioners Were Not Denied Due Process of Law.

It has long been this Court's practice to decline review of a case when the party appealing was successful below. *See, e.g., Public Service Comm'n v. Brashear Freight Liners, Inc.*, 306 U.S. 204, 206 (1939). Whether this principle is embodied in the legal concepts of speculative adjudication, mootness, standing, or absence of case or controversy, it stands for the basic proposition that this Court's jurisdiction is discretionary and should not be exercised lightly in a case in which the appealing party has already been successful below.

Assuming that these Petitioners can invoke this Court's jurisdiction, this is not an appropriate case in which to exercise that jurisdiction. Without specifically identifying the basis for certiorari, Petitioners argue that they were denied due process by the procedural manner in which the state supreme court rendered its decision below. This is not true.

Fundamentally, due process of law is a flexible concept. It requires a protected property interest, state action, notice and an opportunity to be heard. *See, e.g., Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972). From a due process perspective, there is a serious question whether a judicial decision of a state's highest court interpreting a private insurance contract under state law principles can ever constitute state action interference with a protected property interest.

We ask the Court to note that, prior to the supreme court's decision in *Morton*, the courts in New Jersey had interpreted the pollution exclusion in strict accordance with the regulatory submission of the carriers. *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.* 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), held that the pollution exclusion clause was merely a restatement of the "occurrence" definition. Thus, when the state supreme court overruled *Broadwell* in part, it did not deprive the carriers of any interest.

Similarly, the Fourteenth Amendment requires state action. It has been recognized that a state supreme court's decision may constitute state action in the appropriate context. *See Shelly v. Kraemer*, 334 U.S. 1 (1948). Nonetheless, not every state supreme court decision constitutes the type of state action contemplated by the Fourteenth Amendment. *Kraemer* recognized that state action in the nature of enforcing a racially discriminatory provision of a deed could satisfy the requirements of the Fourteenth Amendment. 334 U.S. at 13-14. That case does not stand, and no reported decision has been found to stand, for the proposition that an interpretation given to a private contract by a state supreme court constitutes state action entitling the parties to challenge that decision under the Fourteenth Amendment. The actions of the supreme court below do not constitute the type of state action contemplated by the Due Process Clause.

Even if one reaches the question of whether the Petitioners received an opportunity to be heard in this case, the record demonstrates clearly that the Petitioners not only had full, complete and adequate notice but also had

ample opportunity to be heard. This Court has recognized that the Due Process Clause dictates no particular form of procedure, rather only that there be a meaningful opportunity to be heard at a meaningful time. Nor is an evidentiary hearing a prerequisite to due process. *Kremer*, 456 U.S. at 482; *Matthews*, 424 U.S. at 333-34. These two guiding principles were more than met by the proceedings in the New Jersey Supreme Court.

The carriers were on notice that the regulatory filings were critical to the outcome of the case and fully understood that the concept of regulatory estoppel was placed squarely before the New Jersey Supreme Court. They had a full opportunity to respond and provide whatever record material they chose to influence the court to reach a decision favorable to them. There are numerous record citations demonstrating those points, including:

1. Morton argued before the trial court (as well as in the intermediate appellate court and supreme court) that the IRB explanatory memorandum was crucial in the interpretation of the pollution exclusion, quoting the document in full (R.App. 1a-5a; 47a-52a).

2. The holding of *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), which was followed by both the trial and intermediate appellate courts below (*see* P.App. 153a-156a), relied on the history of the regulatory filings in part to support its conclusion that the pollution exclusion clause was ambiguous and was co-extensive with the occurrence clause.

3. Petitioners' brief in the supreme court acknowledged that estoppel was a critical issue in the case more

than five months before oral argument and prior to additional briefing and the expansion of the record to address that very issue (R.App. 64a).

4. *Amicus* Aetna moved to expand the record to include over 1,500 pages of regulatory and drafting history of the pollution exclusion clause that it asserted in a sworn statement constituted the most extensive in the United States (R.App. 7a-46a).

5. Petitioners joined in that motion, adopting Aetna's representations to the supreme court (R.App. 66a-69a).

6. Aetna's motion to expand the record and the Petitioners' joinder in that motion took place soon after the estoppel issue had served as the basis for the West Virginia Supreme Court of Appeals decision in *Joy Technologies* (R.App. 8a; 66a-69a).

7. *Amici,* the League and Allied specifically identified the estoppel concept as applicable to this case, arguing that the carriers should be estopped from dishonoring the plain import of their explanatory memorandum submitted to state regulatory officials nationwide (R.App. 53a-60a).[4]

---

[4] The New Jersey Supreme Court described that explanatory memorandum as "misleading", "untrue", "indefensible", "perilously close to deception", "inaccurate", "astonishing", "lacking in candor", "not straight forward" and "paradigms of understatement". *Morton,* 134 N.J. at 37-40, 629 A.2d at 852-54.

We also note that Petitioners initially resisted all efforts to introduce extrinsic evidence on drafting or regulatory history. They joined in Aetna's motion to expand the record a few weeks after *Joy Technologies* was decided. Petitioners joined in Aetna's

8. *Amicus* New Jersey Attorney General moved to expand the record so that an accurate and complete record of the New Jersey regulatory history would also be considered by the court. Notably absent from the carriers' complete and comprehensive 1500 pages of regulatory and drafting history were any documents relating to the New Jersey regulatory history. Petitioners opposed the Attorney General's effort to place that material on the record before the supreme court (R.App. 70a-76a).

9. All these materials were submitted prior to oral argument. Further, the carriers filed before oral argument a response brief specifically addressing the Attorney General's submission on the New Jersey regulatory filings (R.App. 79a-81a).

10. Although the Attorney General argued the state's regulatory history at oral argument, Petitioners did not.

11. Following oral argument, the court requested and accepted from the parties additional commentary articulating different points of view with regard to the drafting and regulatory history of the pollution exclusion (R.App. 82a-84a).

---

motion because they were concerned about the impact of *Joy Technologies* in relation to the arguments being made before the New Jersey Supreme Court. Consequently, Petitioners elected to join Aetna's submission of the most comprehensive set of materials on regulatory and drafting history anywhere in the country, thereby reversing their previous position on the issue of introducing extrinsic evidence.

12. After the supreme court rendered its decision on July 21, 1993, the carriers requested an extension of time to file motions for reconsideration, which the court granted (R.App. 85a). In their motions for reconsideration, the carriers fully briefed their due process claim (R.App. 86a-89a). In support of their motion, they also submitted 44 additional affidavits and sought the court's acceptance of those affidavits into the record. These affidavits could have been presented at every previous level of decision in this case.[5]

Clearly, Petitioners were given and took advantage of every opportunity to brief the relevant issues and expand the record in order to influence the court and be heard.

Petitioners request an evidentiary hearing so they can offer testimony on whether regulators 24 years ago understood the "true meaning" of the pollution exclusion despite the misleading explanation the insurers provided when they sought approval of that exclusion. We can only note that Petitioners raise no factual dispute as to the content or the submission of the explanatory memorandum. Petitioners also raise no factual dispute that they offered no other explanation in writing to assist the New Jersey regulators to understand the significant reduction

---

[5] For example, following the decision in *Joy Technologies*, Aetna sought to include in its motion to expand the record the affidavit of Samuel Weese, former West Virginia Commissioner of Insurance, dated July 7, 1992, which repudiated his previous affidavit of 1988 (R.App. 43a-46a). The 1992 Weese affidavit was substantially similar to the 44 affidavits submitted by Petitioners a year later in support of their motion for reconsideration.

in coverage that they now say they accomplished by imposing that exclusion.

Under New Jersey law, review of an administrative agency's decision takes place in the first instance in the intermediate appellate court based on the record on file in the agency. *See N.J. Court Rules* 2:2-3(a)(2); 2:5-4; *Pascucci v. Vaggott*, 71 N.J. 40, 53-54, 362 A.2d 566, 573-74 (1976). Review of an agency decision to approve a pollution exclusion in an insurance contract would have followed that procedure rather than a trial-type evidentiary hearing. Petitioners propose to go far beyond the documentary record to prove the mental processes of the regulators. As the Attorney General's brief in opposition to the carriers' reconsideration motions pointed out, the documentary record is the only reliable record for an administrative decision; private conversations with individual regulators or undisclosed thoughts would be impossible to confirm as the basis for an administrative decision. In fact, several of the New Jersey regulators responsible for the final decision are deceased and unable to rebut or support the statements of the single New Jersey regulator offered by the carriers (R.App. 90a-92a).

Even if the regulators who reviewed the exclusion were available, their mental processes in reaching the decision to approve the exclusion would be privileged. New Jersey courts have seldom, if ever, allowed depositions or trial testimony of members of the executive branch in light of the public interest in the executive's ability to carry out its decisional and consultive functions freely. *See Nero v. Hyland*, 76 N.J. 213, 225-26, 386 A.2d 846, 853 (1978); *N.J. Turnpike Authority v. Sisselman*, 106

N.J. Super. 358, 367, 255 A.2d 810, 814-815 (App. Div. 1969), *certif. denied*, 54 N.J. 565, 258 A.2d 16 (1969).

In sum, the New Jersey Supreme Court provided Petitioners and all parties a full and ample opportunity to present any and all evidence that they believed constituted the regulatory or drafting history of the pollution exclusion clause. In fact, one of the Petitioners herein, American Home, joined by Lloyd's, urged the supreme court to accept Aetna's more than 1500 pages of drafting and regulatory history, stating:

> It is the undersigned insurers position that the Aetna *amicus* brief and the appendices referenced thereto have given the Court a fair and complete picture of the derivation of the pollution exclusion. Should this Court or a lower court in remand wish to consider the issue of extrinsic evidence, the Aetna motion should be granted. [R.App. 66a-67a].

Even if the Petitioners were entitled to present a due process claim to this Court on this petition, they have failed to demonstrate that any violation of due process took place or that it could possibly serve as a basis for this Court's grant of a writ of certiorari.

2. There Are No Special Or Important Reasons That Exist For Granting Certiorari Because The Decision Below Does Not Conflict With The Holdings Of This Court In *Ohio Bell Tel. Co. v. Public Utils. Comm'n* and *Saunders v. Shaw*.

Sup. Ct. R. 10 sets forth the considerations governing this Court's review of a writ of certiorari. That Rule prescribes that a petition will be granted only when there

are "special and important reasons" to do so. The Rule also sets forth the "character of reasons" that this Court will consider in reviewing such applications. The only reason offered in Petitioners' Brief for the Court's favorable consideration of their petition is that the New Jersey Supreme Court "has decided a federal question in a way that conflicts with applicable decisions of this Court." *Sup. Ct. R. 10.1(c)* (*See* P.B. at p. 12).

To satisfy this requirement, Petitioners rely heavily upon the decisions of this Court in *Saunders v. Shaw*, 244 U.S. 317 (1917), and *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937), claiming they squarely conflict with the decision below. That reliance is misplaced.

a. *Saunders*

In *Saunders*, the complainant had *no* opportunity to present his case to the Louisiana Supreme Court. Because of a state rule permitting only one re-hearing in any given matter, the petitioner therein was also foreclosed from asking the court to reconsider its decision and consider complainant's defense. 244 U.S. at 320.

As has been amply pointed out above, Petitioners in this case were not only made aware of the issues in front of the state supreme court *initially* and given the opportunity to submit whatever record evidence they chose to present, but they were also given an extensive opportunity to pursue a motion for re-hearing (reconsideration) to the state supreme court. In that reconsideration motion they extensively briefed the due process issue and added an additional 44 affidavits to the record, presenting what they contended to be the necessary basis for the supreme

court to reconsider its ruling and modify it. There is no comparison whatsoever between the record and opportunity granted Petitioners to be heard in the case below and the record and opportunity granted to the complaining party in *Saunders*.

This Court in *Saunders* noted there may be a remedy gap,

> when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record . . . . [244 U.S. at 320].

The decision of the supreme court below was not done *unexpectedly* at the *end* of the proceeding, and it was certainly not done when Petitioners no longer had any right to add to the record. The record below clearly demonstrates that Petitioners not only had a right to add to the record, but in fact did add to the record and their motions to do so were granted by the state supreme court. Obviously dissatisfied with their previous efforts, Petitioners now come before this Court seeking yet another opportunity to achieve *their* interpretation of the pollution exclusion clause, this time in the guise of the Due Process Clause. *Saunders* does not help them.

b. *Ohio Bell*

Ohio Bell involved orders of the Ohio public utilities commission resulting from a proceeding to determine whether rates charged by a telephone company were excessive. Petitioners argue that the state agency's handling of the hearing on the rate challenge in *Ohio Bell* is

comparable to the supreme court's decision here.[6] Even a cursory reading of *Ohio Bell* demonstrates the fallacy of that argument. As this Court observed:

> Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. [301 U.S. at 300].

Petitioners can hardly claim here that the state court's decision on the pollution exclusion clause was "without warning or even the hint of warning." The fact is the carriers' *amici* and the parties all knew that the issue involving the pollution exclusion clause included the possibility that the New Jersey Supreme Court would decide to bind the carriers to the representations they made to state regulatory agencies when they sought approval of the pollution exclusion endorsement. The carriers represented to the state supreme court prior to its initial decision and prior to oral argument that they believed that their *amicus* Aetna and its counsel "are the only ones in the country who have developed the wealth of industry-wide information and data Aetna propose[d] to make available in this briefing" (R.App. 7a).

---

[6] We note, as Petitioners concede at page 12 of their Brief, that the principles enunciated in *Ohio Bell* have never been applied by this Court to a state appellate court. There is no reason to do so here.

Further, unlike the unique situation presented in *Ohio Bell*, the case below was decided upon voluminous information submitted by all parties including *amici*. There is no hint here that any information was "secretly collected and never yet disclosed" throughout the course of the supreme court's decision below. The information the court relied upon was disclosed long before its own decision and known to the Petitioners for many years.

In addition, Petitioners were given the opportunity to seek reconsideration and permitted to place into the record an additional 44 affidavits that Petitioners argued should cause the supreme court to modify its opinion. Although they had many months to submit these affidavits prior to the court's initial decision, Petitioners in their continuing effort to have it both ways waited until the court's decision. This was true despite the fact Aetna had already introduced into the record on their behalf what the carriers represented was the complete drafting and regulatory history of the pollution exclusion.

Moreover, this Court noted in *Ohio Bell* that even the eventual decision of the commission did not disclose the underlying basis for the conclusions reached, observing that "[t]he putative debtor does not know the proofs today." 301 U.S. at 300. That is not this case. There were no secret proceedings below involving a state administrative agency. Any deception practiced below was found to be that of the Petitioners. Petitioners are challenging here the conduct of the state supreme court whose operations were open, notorious, on the record and actively participated in by all parties and their amici, including these Petitioners.

In sum, *Saunders* and *Ohio Bell* are inapposite and Petitioners' efforts to utilize these cases to support a petition for a writ of certiorari to this Court do not hold up under scrutiny.[7]

---

[7] We point out that there is currently pending before Congress proposed legislation regarding Superfund Reauthorization ("Superfund Reform Act of 1994"; S. 1834, H.R. 3800) ("SRA"). Title VIII of the SRA, entitled the "Environmental Insurance Resolution and Equity Act of 1994," proposes the creation of an "Environmental Insurance Resolution Fund" that would specifically address the resolution of state law issues that are raised, like the present issue, in environmental insurance coverage litigation. This is but an additional factor that further militates in favor of denying the present petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE F. KUGLER, JR.
Counsel of Record
EDWARD C. LAIRD
ELLIS I. MEDOWAY
ARCHER & GREINER,
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, New Jersey 08033
(609) 795-2121

Of Counsel:
THOMAS C. HILL
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

DATED: June 10, 1994

No. 93-1797

In The

Supreme Court of the United States

October Term, 1993

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Petitioners,

v.

MORTON INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of New Jersey

APPENDIX TO RESPONDENT MORTON'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS OF APPENDIX

Page

APPENDIX A

Portions of Respondent Morton's Brief filed in Chancery Division in Support of Cross-Motion for Partial Summary Judgment and in Opposition to Certain Carrier Defendants' Motions for Summary Judgment, dated April 15, 1987 ..... 1a

APPENDIX B

Portions of Insurance Rating Board Circular to Board and Associate members, dated May 15, 1970, with Explanatory Memorandum on pollution exclusion, contained in Morton's Appendices filed with New Jersey Superior Court, Chancery and Appellate Divisions 3a

APPENDIX C

Portions of Certification of *Amicus* Aetna Casualty and Surety Company's ("Aetna") counsel in support of motion to appear as *amicus curiae* below and to supplement record on drafting and regulatory history of pollution exclusion, dated April 29, 1992 ..... 6a

APPENDIX D

Certification of Aetna's counsel in support of motion to expand record, dated June 25, 1992 ..... 8a

Tables of Contents to Supplemental Appendices of Aetna, Volumes I-IV, identifying over 1,500 pages of drafting and regulatory history on pollution exclusion, filed with New Jersey Supreme Court 12a

TABLE OF CONTENTS OF APPENDIX – Continued

Page

Portion of Aetna's Brief filed with New Jersey Supreme Court, dated June 25, 1992 ..... 41a

Letter dated July 21, 1993 from Aetna's counsel to New Jersey Supreme Court with enclosed Samuel H. Weese Affidavit, dated July 7, 1992 ... 43a

APPENDIX E
Portions of Respondent Morton's Brief filed with New Jersey Supreme Court regarding pollution exclusion, dated June 8, 1992..... 47a

APPENDIX F
Portions of *Amicus* Allied-Signal, Inc., *et al.* Brief filed with New Jersey Supreme Court, dated June 19, 1992..... 53a

APPENDIX G
Portions of *Amicus* League of Municipalities' Amended Brief filed with New Jersey Supreme Court, dated June 24, 1992 ..... 57a

APPENDIX H
Portions of Petitioners' Reply Brief on pollution exclusion filed with New Jersey Supreme Court, dated June 29, 1992 ..... 61a

APPENDIX I
Portions of Petitioner American Home's and Underwriters at Lloyd's Brief in Support of Aetna's motion to expand record, dated July 30, 1992 ..... 66a

APPENDIX J
Petitioner Insurance Company of North America's ("INA") joinder in Brief of other Petitioners in support of Aetna's motion to expand record, dated July 31, 1992 ..... 68a

TABLE OF CONTENTS OF APPENDIX – Continued

Page

APPENDIX K

Portions of Petitioners' (INA, American Home and Liberty Mutual) Brief in opposition to New Jersey Attorney General's motion to participate as *Amicus* and to expand record filed with New Jersey Supreme Court, dated September 14, 1992 ..... 70a

Portions of London Market's Brief in opposition to New Jersey Attorney General's participation as *Amicus* and to expand record, filed with New Jersey Supreme Court, dated September 14, 1992 ..... 73a

Portions of Petitioners' (Continental Casualty, General Accident and First State) Brief in opposition to New Jersey Attorney General's participation as *Amicus* and to expand record, filed with New Jersey Supreme Court, dated September 14, 1992 ..... 75a

APPENDIX L

Portions of *Amicus* New Jersey Attorney General's Brief filed with New Jersey Supreme Court, dated October 28, 1992 ..... 77a

APPENDIX M

Portions of Petitioners' Brief filed with New Jersey Supreme Court responding to New Jersey Attorney General's Brief on regulatory history of pollution exclusion, dated November 12, 1992 ..... 79a

APPENDIX N

Letter dated December 30, 1992 from Respondent Morton's counsel to New Jersey Supreme Court enclosing requested additional commentaries on pollution exclusion 82a

TABLE OF CONTENTS OF APPENDIX – Continued

Page

Letter dated January 15, 1993 from Aetna's counsel to New Jersey Supreme Court enclosing requested additional commentary on pollution exlcusion 84a

APPENDIX O

Petitioners' Notice of Motion for Reconsideration and Portions of Brief in Support filed with New Jersey Supreme Court, dated August 30, 1993 ..... 85a

APPENDIX P

Portions of New Jersey Attorney General's Brief regarding Motions for Reconsideration filed with New Jersey Supreme Court, dated December 15, 1993 ..... 90a

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION

MORTON THIOKOL, INC., Plaintiff, vs. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*, Defendants.	Docket No. C-3956-85 PLAINTIFF'S BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO CERTAIN CARRIER DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

* * *

In equating the ISO form with the definition of occurrence, the court in *Jackson Township MUA* acted consistently with the stated intent of the IRB in promulgating the clause and the demonstrated intent of the insurers that imposed it on their insured. In circulating the ISO form to its members, the IRB explained:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion *clarifies* this situation so as to avoid any

> questions of intent. *Coverage is continued* for pollution or contamination caused injuries with the pollution or contamination resulting from an *accident*. . . . (Emphasis added.)
>
> IRB Circular Number 208, App. Vol. IV, Tab 1, pp. ISO 28, ISO-30.

Commentators support this interpretation:

> Pollution: Exclusion (f) is new. It eliminates coverage for damages arising out of pollution or contamination, where such damage appears to be expected or intended on the part of the insured and hence are excluded by definition of "occurrence."

3 R. Long, *Law of Liability Insurance*, Appendix C at 58. Moreover, the insurers effectuated this interpretation by imposing the ISO form on their insured without any reduction in premium for the coverage purportedly excluded, evincing an understanding that no current coverage was being removed.[196] The *Jackson Township MUA* holding is, thus, in complete accord with the insurance industry's treatment of the ISO form.

* * *

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for Plaintiff
Morton Thiokol, Inc.

By:_____
Edward C. Laird

---

[196] See Affidavit of George W. Floyd, ¶5; App. Vol. IV, Tab 6.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-895-89T3

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*

Defendants-Respondents.

APPENDIX VOLUME VII

MORTON INTERNATIONAL, INC.

---

* * *

INSURANCE RATING BOARD

May 15, 1970

CIRCULAR TO BOARD MEMBERS AND
ASSOCIATE MEMBERS
General Liability #206

CONFIDENTIAL

- - -

Effective June 10, 1970

- - -

Gentlemen:

Contamination and pollution exclusions, as described below, have been filed or will be filed in all jurisdictions to be effective June 10, 1970, in accordance with the rule of application shown in the latter part of this letter. These exclusions will apply to all general liability insurance covering bodily injury and property damage except comprehensive personal and farmers comprehensive personal liability and professional liability insurance.

The exclusions wordings are as follows:

> Contamination or Pollution Exclusion. Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

* * *

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.

* * *

APPENDIX C

MORTON INTERNATIONAL, INC. Plaintiff-Appellant/ Petitioner vs. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al., Defendants-Respondents/ Cross-Petitioners.	SUPREME COURT OF NEW JERSEY Docket No. 34,341 *CERTIFICATION OF VICTOR C. HARDWOOD, III IN SUPPORT OF AETNA'S MOTION TO APPEAR AS AMICUS CURIAE*

I, VICTOR C. HARDWOOD, III, do hereby certify as follows:

* * *

8. Aetna submits it is in a unique position to brief on behalf of insurers the drafting and regulatory history of those policy provisions and the way they were understood by policyholders. Its counsel herein have devoted many hundreds of hours researching, analyzing and compiling thousands of documents on this subject from the files of the Insurance Service Office, insurance brokers, state insurance commissioners, policyholders' insurance and manufacturing trade associations, the federal Environmental Protection Agency, and publicly available insurance materials.

* * *

10. Based upon comments in reported cases, discussions with other insurer counsel, and briefs heretofore filed in environmental litigation throughout the country, it appears this evidence has never before been presented to courts except recently by Aetna's counsel herein. Indeed, the reported cases reveal that courts nationwide, including New Jersey's lower courts, have only considered the barest handful of documents, if any. They have reached their conclusions in a vacuum supported only by other cases of the same sort and comments from articles primarily authored by counsel who represented policyholders. Those articles make adversarial arguments which courts have incorrectly accepted as impartial, factually accurate reports.

11. At the risk of being presumptuous, and based upon the fact that Aetna is not aware that any other carrier has ever presented this evidence to courts, it is believed that Aetna and counsel herein are the only ones in the country who have developed the wealth of industry-wide information and data Aetna proposes to make available in this briefing. Indeed, other insurers opposed Aetna's efforts, asserting that it is never necessary to go beyond plain policy language and resort to extrinsic evidence.

* * *

APPENDIX D

SUPREME COURT OF NEW JERSEY

Docket No. 34,341

Plaintiff(s) – Appellant/Petitioner MORTON INTERNATIONAL, INC., vs. *Defendant(s)* – Respondents/ Cross-Petitioners GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.	**CERTIFICATION OF VICTOR C. HARWOOD, III**

I VICTOR C. HARWOOD, III, do hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and a partner of the firm of Harwood Lloyd, Esqs. I am the attorney in charge of this firm's representation of the Aetna Casualty and Surety Company (hereinafter "Aetna") in this matter and I am fully familiar with it.

2. This Court granted Aetna's motion for leave to participate as *amicus curiae* by order dated May 26, 1992. This Certification is made in support of Aetna's motion to clarify the Court's May 26, 1992 order granting Aetna's motion for leave to appear as *amicus curiae* or, in the alternative, to expand the record below *nunc pro tunc* and file a supplemental appendix.

3. As part of Aetna's motion, and for the Court's convenience, Aetna has submitted copies of those documents it seeks to present to this Honorable Court. Those documents are contained in Volumes I, II, III and IV of Aetna's "Supplemental Appendix" ("Asa").

4. Many of the documents contained in Aetna's supplemental appendix were produced during the course of discovery in the following related cases:

"*Morton I*" – the underlying lawsuit upon which this appeal is based – *Morton Thiokol v. General Accident Insurance Company of America, et al*, Docket No. C-3956-85 (N.J. Super. Ch. Div.);

"*Morton II*" – a lawsuit involving the same policyholder, but different sites – *Aetna Casualty & Surety Co. v. Morton Thiokol, et al*, Docket No. L-41046-87 (N.J. Super. Law Div.) (formerly C-3348-86E); and

"*Morton III*" – a lawsuit filed by Thiokol in Ohio – *Morton Thiokol, Inc. v. Aetna Casualty & Surety Co.*, No. A8603799 (Ohio Ct. Common Pleas).

5. Discovery in all Morton cases was coordinated by the various trial courts. The relevant orders are attached to the Supplemental Appendix at Asa 179-180; trial court order entered in "*Morton II*" dated July 30, 1986: " . . . all discovery in either case ("*Morton I*" and "*Morton II*") shall be available for use by all parties in each case." See also, Asa 181-185 at Asa 184-185; Case Management Order I entered in "*Morton II*" on October 30, 1986, par. 9, which

coordinates *"Morton I"* and *"Morton II"* discovery with other Morton cases pending in Ohio (*"Morton III"*) and Illinois.

6. Thus, counsel for Thiokol participated in and had access to all discovery in the *Morton I, II* and *III* litigations.

7. For the Court's convenience, all of the documents contained in the supplemental appendix which were obtained through discovery in the *"Morton I, II* and *III"* litigations are indexed according to footnote or text location where Aetna's *amicus* brief or memorandum in support of this Motion reference those documents. Further, the indexes identify the *"Morton I, II* and *III"* discovery source in which they were included. Some discovery sources, such as ISO, produced documents which remain "confidential" under protective order. All of the documents mentioned in the Mealey's articles discussed in Aetna's *amicus* brief are public. The few documents which remain protected are only discussed in the memorandum submitted in support of the motion to file a supplemental appendix. For that reason said memorandum and supplemental appendix are filed under seal. A description of each index is set forth at pages 4-6 of Aetna's Memorandum in Support of this Motion which urges the Court to file and consider the supplemental appendix. The indexes are located at Volume IV, Asa 1092-1108.

8. Any document used in this supplemental appendix which was not obtained through discovery in the *"Morton I, II* and *III"* litigations was obtained through Aetna's informal discovery efforts, *i.e.*, either through: a)

publicly available document searches; or b) unprotected document sources.

9. Searches for publicly available and unprotected documents were made at the following locations: United States Environmental Protection Agency, policyholder insurance and manufacturing trade associations, insurance brokers and broker trade associations, state insurance commissions, College of Insurance, various law libraries and other public libraries.

10. The types of documents which constitute publicly available documents are periodicals, magazine articles, books, speeches and the like.

11. Unprotected document sources include letters, memos, deposition transcripts, etc. which are not covered under any confidentiality agreements or orders.

I hereby certify that the above statements made by me are true. I am aware that if any of these statements are willfully false, I am subject to punishment by the Court.

/s/ Victor C. Harwood, III
Victor C. Harwood, III

Dated: June 25th, 1992
Hackensack, New Jersey

TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX OF *AMICUS CURIAE*, AETNA CASUALTY & SURETY COMPANY

Document	Appendix No.
Victor C. Harwood, III, Brian J. Coyle and Edward Zampino, *The 'Frivolity' of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Insurance Litigation Reports No. 40 (August 27, 1991).	Asa1-36
Victor C. Harwood, III, Brian J. Coyle and Edward Zampino, *The Emperor's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence* (Part One) 6 Mealey's Insurance Litigation Reports No. 25 (May 5, 1992)	Asa37-74
Victor C. Harwood, III, Brian J. Coyle and Edward Zampino, *The Emperor's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence* (Part Two), 6 Mealey's Insurance Litigation Reports No. 26 (May 12, 1992)	Asa75-108
Victor C. Harwood, III, Brian J. Coyle and Edward Zampino, *The Occurrence Definition and Extrinsic Evidence: The Diogenesian Search for the Reasonable Man*, 6 Mealey's Insurance Litigation Reports No. 31 (June 16, 1992)	Asa109-125
Robert N. Sayler, *The Emperor's Newest Clothes, Revisionism and Retreat: The Insurer's Last Word on the Pollution Exclusion*, 5 Mealey's Insurance Litigation Reports No. 46 (October 8, 1991)	Asa126-163

Order granting League of Municipaliteis and Institute of Municipal Attorneys Leave to Appear as *Amicus Curiae* (May 26, 1992; filed May 29, 1992)	Asa164
Order granting Allied-Signal, et al. Leave to Appear as *Amicus Curiae* (May 26, 1992; filed May 29, 1992)	Asa165
Notice of Motion and Memorandum by Allied-Signal, et al. For Leave to Appear as *Amicus Curiae* (filed April 15, 1992)	Asa166-178
Court Order in *Aetna Casualty & Surety Co. v. Morton Thiokol Inc., et al.*, No. C-3348-86E (N.J. Super. Ch. Div.) (July 30, 1986)	Asa179-180
Case Management Order I in *Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. C-3348-86E (N.J. Super. Ch. Div.) (October 30, 1986).	Asa181-185
Morton Thiokol, Inc.'s Amended Notice to Take Oral Deposition of a Representative or Representatives of the Insurance Services Offices Inc., in *Morton Thiokol, Inc. v. General Accident Ins. Co., et al.*, No. C-3956-85 (N.J. Super. Ch. Div.) (January 26, 1988).	Asa186-196
Morton Thiokol, Inc.'s Notice to Take Oral Deposition of a Represenative or Representatives of the Insurance Services Offices, Inc. in *Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. L-41046-87 (N.J. Super. Law Div.) (January 13, 1988).	Asa197-210

Certification of Hope G. Nightingale, Esq. in *Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. L-41046-87 (N.J. Super. Law Div.) (March 14, 1988).	Asa211-214
Court Order in *Aetna Casualty & Surety Co. v. Morton Thiokol Inc., et al.*, No. L-41046-87 (N.J. Super. Law Div.) (April 22, 1992).	Asa215-219
Affidavit of Anne Marie Donovan in *Morton International, Inc. v. General Accident Insurance Co. of America, et al.*, No. A-895-89T3 (N.J. Supreme Court) (May 28, 1992).	Asa220-222
Aetna Casualty & Surety Co.'s Notice to Take Video Tape Deposition of George Katz in *Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. C-3348-86E (N.J. Super. Law Div.) (December 21, 1989).	Asa223-224
Transcript of Deposition of George Katz in, *inter alia Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. L-41046-87 (N.J. Super. Law Div.) (January 24, 1990; January 29, 1990) (excerpts).	Asa225-253
Letter from Thomas C. Hill to Christopher J. Watts (March 14, 1990).	Asa254
Transcript of Deposition of Francis X. Bruton, Jr. in *Morton Thiokol, Inc. v. Aetna Casualty & Surety Co., et al.*, No. A-8603799 (Ohio Ct. Com. Pl.) (July 31, 1989) (excerpt).	Asa255

Affidavit of Francis X. Bruton, Jr. in *Morton Thiokol, Inc. v. Aetna Casualty & Surety Co., et al.*, No. A-8603799 (Ohio Ct. Com. Pl.), (September 21, 1989) (attached to Affidavit are: Asa256-301

Exhibit A: Agenda and Minutes, Meeting of the General Liability Governing Committee (March 17, 1970); Asa265-266

Exhibit B: Aetna interoffice memorandum from R.S. Hansen, Assistant Vice President, to H.E. Daries, Superintendent (March 20, 1970); Asa268-270

Exhibit C: Agenda and Minutes, Meeting of the General Liability Governing Committee (April 15, 1970); Asa272-274

Exhibit D: Aetna interoffice Memorandum from R.S. Hansen to H.E. Daries (April 17, 1970); Asa276-278

Exhibit E: Letter from Edward F. Earle to Frank X. Bruton (April 22, 1970); Asa280-283

Exhibit F: Letter from A.J. Hill to R.C. Lukens (April 27, 1970); Asa285-286

Exhibit G: Letter from F.X. Bruton to Edward F. Earle (May 1, 1970); Asa288-291

Exhibit H: Letter from F.X. Bruton, Jr. to Norman Nachman (May 5, 1970); Asa293-295

Exhibit I: Letter from Edward F. Earle to Frank X. Bruton (June 2, 1970);	Asa297
Exhibit J: Letter from F.X. Bruton, Jr., Aetna Life & Casualty, to Edward F. Earle, IRB (June 5, 1970);	Asa299
Exhibit K: Personal Injury Liability Insurance Endorsement Form (1-73).	Asa301
Morton Thiokol, Inc. Answer to Interrogatory No. 29 in *Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. L-41046-87 (December 3, 1987) (excerpt).	Asa302-305
Transcript of Deposition of George Floyd in *Morton Thiokol, Inc. v. Aetna Casualty & Surety Co., et al.*, No. A-8603799 (Ohio Ct. Com. Pl.) (April 6, 1988) (excerpts).	Asa306-308
Morton Thiokol, Inc. interoffice memorandum from George Floyd to File (April 13, 1971).	Asa309-314
Letter from W.H. Atchison to Clifford R. Malmstrom (February 6, 1963) and attached Minutes of Meeting (January 31, 1963 to February 1, 1963).	Asa315-319
Report, Alexander & Alexander, "Environmental Impairment Liability" (undated).	Asa320-326
Letter from G.W. Floyd to George W. Bodamer (October 21, 1981) attaching	Asa327

Report by Thiokol Corporation "Summary of Environmental Incidents, Claims and Litigation" (October 9, 19981).	Asa328-337
Report by Environmental Risk Assessment Service (USA), Ltd. "Report on Thiokol Corporation" (January 20, 1982).	Asa338-345
Agenda, Meeting of Alexander & Alexander (June 17, 1982).	Asa346-347
Court Order in *Aetna Casualty & Surety Co. v. Morton Thiokol, Inc., et al.*, No. L-41046-87 (N.J. Super. Law Div.) (August 1, 1989).	Asa348-354
Donald C. Brain, CPCU, *Changes, Possible Problems in the New Liability Policy,* (June 1966).	Asa355-357
Letter from George Katz to Edward F. Earle (April 17, 1961) with attached "Report to the Joint Forms Committee" (April 17, 1961).	Asa358-364
Minutes, Meeting of the Joint Scope of Coverage Subcommittee (September 19-20, 1961).	Asa365-374
"Explanatory Memorandum of Changes" (filed Feburary 1, 1966).	Asa375-383
Richard Rupp, CPCU "Insurance and Risk Management Glossary" (1991).	Asa384-387
Robert S. Soderstrom, *The Role of Insurance in Environmental Litigation,* XI The Forum 762 (1976).	Asa388-397

Sheldon Hurwitz and Dan D. Kohane, *The Love Canal – Insurance Coverage for Environmental Accidents*, 50 Ins. Couns. J. 378 (1983).	Asa398-404
Garrett L. Joest, III, *Will Insurance Companies Clean the Augean Stables? – Insurance Coverage for the Landfill Operator*, 50 Ins. Couns. J. 258 (1983).	Asa405-408
Counsel list in *Jackson Township v. American Home Assurance Co., et al.*, No. A-170-81T3 (N.J. Super. App. Div.) (March 24, 1982).	Asa409-410
E. Joshua Rosenkranz, Note, *The Pollution Exclusion Through the Looking Glass*, 74 Geo L.J. 1237, 1240 (1986) (excerpt).	Asa411-416
Thomas R. Newman, *Liability Insurance Coverage Principles* (Rev. ed. 1983) (excerpt).	Asa417-423
Barry R. Ostrager and Thomas R. Newman, *Insurance Coverage Disputes* (Second Edition) (1989) (excerpt).	Asa424-433

Rowland H. Long, L.L.M., *The Law of Liability Insurance*, Vol. 3 (1969) (excerpts).	Asa434-438
Rowland H. Long, L.L.M., *The Law of Liability Insurance*, Vol. 2 (1992) (excerpts).	Asa439-443
Letter from Frank Sullivan, Kansas Commissioner of Insurance, to Lawrence E. Brown, Jr., IRB (June 11, 1970).	Asa444
Letter from Lawrence E. Brown, Jr., IRB, to Frank Sullivan, Kansas Commissioner of Insurance (June 18, 1970).	Asa445-446
Order of Kentucky Insurance Commissioner in *In the Matter of General Liability Insurance Contamination* (June 24, 1970)	Asa447
Letter from R. Stanley Smith, Manager, I.R.B. to Robert G. Gibson, Rating Director, Mississippi Insurance Commission (June 1, 1970)	Asa448
Letter from Richard E. Stewart, Principal Insurance Examiner Rating Bureau, State of New York Insurance Department to Nicholas J. Pandullo, Manager, IRB (June 2, 1970)	Asa449
Letter from Milton S. Troxell, Texas State Board of Insurance, to Lawrence E. Brown, Jr., Manager, IRB (June 2, 1970)	Asa450
IRB interoffice corresondence from R.G. Foster to Helen O'Brien (June 1, 1970)	Asa451

Letter from Lawrence E. Brown, Jr. of IRB to Texas State Board of Insurance (May 28, 1970)	Asa452
Letter from B.I. Farrell of IRB to Hon. Samuel H. Weese of State of West Virginia Insurance Department (August 28, 1970)	Asa453
Letter from R. Stanley Smith, Manager, IRB to Emory Lipscomb (June 10, 1970)	Asa454
Letter from Emory Lipscomb, Rating Deputy, Georgia Comptroller General to R. Stanley Smith, Manager, IRB (May 29, 1970).	Asa455-456
Aetna interoffice memorandum from David L. Marshall to James C. Stamos (June 19, 1970).	Asa457
IRB interoffice corresondence from Henry E. Griffendorf, Jr. to Norman Nachman (June 16, 1970)	Asa458
Letter from Ted. C. Tow of Insurance Department of Iowa to Henry E. Griffendorf, Jr., of IRB (June 4, 1970)	Asa459
Letter from Henry E. Griffendorf, Jr., IRB to Hon. Russell E. VanHooser, Michigan Commissioner of Insurance (June 16, 1970)	Asa460
Letter from Henry E. Griffendorf, Jr., IRB to Hon. Warren Dirks, South Dakota Insurance Commissioner (June 30, 1970)	Asa461

IRB interoffice corresondence from B.I. Farrell to Norman Nachman (May 27, 1970)	Asa462
IRB interoffice corresondence from B.I. Farrell to Helen O'Brien, State Rate Filing Division (May 27, 1970)	Asa463
Letter from Robert L. Haydon, Jr., of Government of the District of Columbia Department of Insurance to B.I. Farrell, IRB (May 25, 1970)	Asa464
Letter from IRB to Board Members and Associate Members (June 23, 1970).	Asa465-467
Letter from R.G. Foster of IRB to Milton S. Troxell, Director, Texas State Board of Insurance (April 20, 1970).	Asa468
Letter from Manager, IRB to Commissioner of Insurance, Puerto Rico (November 30, 1970).	Asa469-470
Letter from K.D. Gill, Assistant Manager of Government and Industry Relations to Robert E. Holcombe, Actuary North Carolina Department of Insurance (May 12, 1972).	Asa471
Order of West Virginia Insurance Department in Proceedings before Samuel H. Weese, Insurance Commissioner of West Virginia (August 19, 1970).	Asa472-479

Transcript of Deposition of Richard E. Stewart in *Shell Oil Company v. Accident and Casualty Insurance Company of Winterthur*, No. 278953, Ca. Sup. Ct., San Mateo County (September 29, 1987) (excerpts).	Asa480-484
Letter from Donald W. Brown, W.Va. Deputy Commissioner of Insurance to Walter R. Sparks, Jr. of Ins. Co. of N. America (March 30, 1970).	Asa485
Transcript of Deposition of Donald W. Brown in *Aerojet – General Corporation, et al. v. Argonaut Insurance Company, Inc., et al.*, No. 262425, Ca. Sup. Ct., San Mateo County (September 11 and October 1, 1990) (excerpts).	Asa486-494
Timothy C. Russell, Thomas S. Schaufelberger and Alan C. Nessman, *Lawyers Say Insureds Are Attempting To Reinvent History*, Mealey's Insurance Litigation Reports No. 10 (March 23, 1988).	Asa495-505
Seminar, Johnson & Higgins, "Protecting Your Assets Against Pollution Liabilities" (November 4-5, 1982) (excerpt).	Asa506-508
Special Report: Pollution Exclusion Dissected During Bruton Deposition, Mealey's Insurance Litigation Reports Vol. 4 No. 8 (February 27, 1990).	Asa509-518

Affidavit of Francis X. Bruton, Jr. in *New Castle County v. Hartford Accident & Indemnity Co., et al.*, No. CA 85-436-JLL (U.S. Dist. Ct. Del.) (September 28, 1987) (attached to affidavit are: Asa519-551

Exhibit A: Agenda and Minutes, Meeting of the General Liability Governing Committee (March 17, 1970); Asa526-527

Exhibit B: Aetna interoffice memorandum from R.S. Hansen, Assistant Vice President, to H.E. Daries, Superintendent (March 20, 1970); Asa528-530

Exhibit C: Agenda and Minutes, Meeting of the General Liability Governing Committee (April 15, 1970); Asa531-533

Exhibit D: Aetna interoffice Memorandum from R.S. Hansen to H.E. Daries (April 17, 1970); Asa534-536

Exhibit E: Letter from Edward F. Earle to Frank X. Bruton (April 22, 1970); Asa537-540

Exhibit F: Letter from A.J. Hill to R.C. Lukens (April 27, 1970); Asa541-542

Exhibit G: Letter from F.X. Bruton to Edward F. Earle (May 1, 1970); Asa543-546

Exhibit H: Letter from F.X. Bruton, Jr. to Norman Nachman (May 5, 1970); Asa547-549

Exhibit I: Letter from Edward F. Earle to Francis X. Bruton (June 2, 1970);	Asa550
Exhibit J: Letter from F.X. Bruton, Jr., Aetna Life & Casulaty, to Edward F. Earle, IRB (June 5, 1970).	Asa551
Note, *Developments in the Law-Toxic Waste Litigation*, 99 Harv. L. Rev. 1458 (1986) (exerpts).	Asa552-556
John M. Briggs, *Accident vs. Occurrence*, Bests Fire and Casualty News 103 (December 1953) (excerpt).	Asa557-559
Richard A. Schmalz, *Taking the Suddenness Out of Accident*, (undated) (excerpt).	Asa560-561
Robert F. Bauer, LLB of Johnson & Higgins, "Comparison 1955-1966 Comprehensive General Liability Policies" as attached to Letter from Dorrance Sexton, Chairman, Johnson & Higgins to "To Our Clients," (excerpt).	Asa562-569
S.S. Huebner, Kenneth Black, Jr., and Robert S. Cline, *Accident vs. Occurrence* Property and Liability Insurance, Prentice (1968).	Asa570-573
S.S. Huebner, Kenneth Black, Jr., and Robert S. Cline, *Property and Liability Insurance* (2d ed. 1976) (excerpts)	Asa574-579

S.S. Huebner, Kenneth Black, Jr., and Robert S. Cline, *Property and Liability Insurance* (3d ed. 1982) (excerpts).	Asa580-585
James M. Johnstone & Frederick S. Ansell *Insured Counsel Doubletalk: The Fallacies in Anderson and Passannante's Arguments Concerning the Interpretation of 'Sudden and Accidental' in Boiler and Machinery Policies*, 5 Mealey's Insurance Litigation Reports No. 10 (January 15, 1991).	Asa586-592
Minutes, Meeting of General Liability Rating Committee (November 17-19, 1964) (excerpt).	Asa593-595
Mutual Insurance Rating Bureau ("MIRB"), *Memorandum – Revision of Manuals of Liability Insurance to Implement Revised General Liability Policy Forms and Endorsements (Effective July 1, 1966)* as attached to Letter from David E. Kuizenga, Secretary MIRB to Hon. Charles R. Howell, Ins. Commissioner, N.J. (February 16, 1966).	Asa596-597
Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970).	Asa598-622
Alexander and Alexander National Environmental Action Team Pamphlet (March 1, 1981) (excerpt).	Asa623-624
Alexander and Alexander 1979 Annual Report (1979) (excerpt)	Asa625-626

Johnson & Higgins interoffice memorandum from Elten Diehlmann to Gilbert Buckley (September 23, 1983).	Asa627-629
Seminar, Johnson & Higgins, "Pollution Liability Legislation and Insurance" (undated) (excerpt).	Asa630-638
Minutes, Johnson & Higgins Casualty Department New Business Meeting (May 11, 1970).	Asa639-643
Douglas McLeod, *Grappling With Pollution Insurance,* Business Insurance, (November 28, 1983).	Asa644-645
8 Frank B. Hall Newsletter, No. 24 (June 13, 1979).	Asa646-649
Douglas E. Gladstone, *CGL Pollution Exclusion,* Business Insurance, (October 29, 1984).	Asa650-653
NAIB, "Membership Survey on Comprehensive General Liability Policy" (March 24, 1978) (excerpt).	Asa654-655
USEPA, "Background Document – Resource Conversation and Recovery Act – Subtitle C – Hazardous Waste Management" (April 25, 1980) (excerpt).	Asa656-678
CMA, *Comments . . . on EPA's Proposed Financial Requirements Implementing Section 3004 of RCRA* (July 18, 1980).	Asa679-695
CMA, *Comments . . . under (CERCLA)* (July 12, 1983) (excerpt).	Asa696-710

Letter from L.D. Johnson, Rohm & Haas to USEPA (March 16, 1979) (excerpt).	Asa711-714
Letter from Daniel B. Rathburn, V.P. American Petroleum Institute to USEPA, *Comments on Proposed Regulations* (July 18, 1990) (excerpt).	Asa715-719
Letter from Edith F. Lichota of RIMS to Docket Clerk, Office of Solid Waste, USEPA *Comments on Proposed Regulations* (July 15, 1980).	Asa720-724
Alexander & Alexander, *RIMS Seminar Update of Environmental Impairment Insurance* (April 21, 1982).	Asa725-731
15 N.J. Reg. 1800-1804, Vol. 15, No. 21 (November 7, 1983).	Asa732-737
20 N.J. Reg. 2650, Vol. 20, No. 21 (November 7, 1988).	Asa738-739
N.J. Admin. Code 7:26-9.10(d)(3-4) (26-231 to 233); N.J. Admin. Code 7:26-9.13(a) and (b) (26-261 to 264); N.J. Admin. Code 7:26-Appendix A(g) and (h) (26-278.7 to 278.9).	Asa740-750
Thomas A. Caldwell, *A Multinational's Environmental Liability Problems*, International Insurance Report, (September 1986).	Asa751-755
"Who's Who in Risk Management" (1991) (excerpt).	Asa756-757

John W. Milligan, *Risk Managers Design Own Pollution Liability Form,* Business Insurance (May 3, 1982). Asa758-759

Douglas McLeod, *Most Firms Plan to Insure Gradual Pollution Risks,* Business Insurance (January 31, 1983). Asa760-761

7 The John Liner Letter, No. 6 *Bureau Action,* (May 1970) (excerpt). Asa762-764

G.R.E. Bromwich, *Pollution and Insurance,* Risk Management (April 1971). Asa765-771

Gail A. Hayes, *Plugging the Gap in Pollution Liability Coverage,* 12 Rough Notes (November 1979). Asa772-775

Tony Levine, *Unnatural Catastrophes, The Cost of Pollution,* The Review (July 24, 1981). Asa776-779

Lisa Hoffman, *The Pollution Liability Tug of War,* 128 Rough Notes, 30 (August 1985). Asa780-782

David J. Dybdahl, *EIL Coverage: Action and Reaction,* Risk Management 9 (September 1985). Asa783-788

Day Lee, *RCRA, CERCLA and Insurance,* Insurance Week (May 18, 1984). Asa789-790

Address by Robert Hatcher, NAIB Annual Convention Sea Island, Georgia (May 28, 1985). Asa791-802

Webster's New International Dictonary, "Introduction" (2d ed. Unabridged 1959).	Asa803-810
The Random House Dictionary of the English Language, (2d ed. Unabridged 1987).	Asa811-815
Frunk & Wagnall's New Standard Dictionary of the English Language (1st ed. 1963).	Asa816-820
Memorandum from George Katz to L. Senger (March 22, 1961).	Asa821-822
Minutes, Meeting of Joint Forms Committee (May 2, 3, and 4, 1961).	Asa823-837
Letter from Norman Nachman to General Liability Rating Committee (May 31, 1962).	Asa838-844
Letter from Mr. Pandullo to Norman Nachman (July 23, 1970)	Asa845
Minutes, Meeting of General Liability Rating Committee (October 10-11, 1962).	Asa846-849
Report of Proceedings, Mutual Insurance Technical Conference (November 18, 1963) (excerpt).	Asa850-857
Exhibit I to Memorandum from Subcommittee on Definition of 'Occurrence' to Joint Forms Committee (October 20-22, 1964).	Asa858-862

Letter from Robert F. Bauer, Johnson & Higgins to George Katz, Aetna Casualty & Surety Co. (July 22, 1966).	Asa863-870
Letter from George Katz, Aetna Casualty & Surety Co. to Robert F. Bauer, Johnson & Higgins (August 31, 1966).	Asa871-886
RIMS, *Customer Analysis of the Comprehensive General Liability Policy* (1968) (excerpts).	Asa887-896
Yale Goldman, *The Standard Comprehensive General Liability Policy From a Manufacturer's Point of View*, 28 CPCU Annals 77 (June 1975).	Asa897-905
7 The John Liner Letter, No. 3 (February 1970), (excerpts).	Asa906-907
17 The John Liner Letter, No. 8 (July 1980), (excerpts).	Asa908-910
John T. Even, *The Corporate Insurance Administrator – Problems with the 1966 Revised Liability Policy*, III The Forum, 95 (January 1968).	Asa911-918
Letter from Edward F. Earle to Hon. T. Nelson Parker, Virginia Commissioner of Insurance (October 28, 1965).	Asa919-920
Herbert P. Schoen, *Caused by Accident* (February 1961) (excerpt).	Asa921-941
Minutes, Meeting of General Liability Rating Committee (July 19-20, 1961).	Asa942-950

Statement, George Katz (undated).	Asa951-957
Letter from Thomas C. Hill to Hope G. Nightingale (July 5, 1989).	Asa958-959
Chart in Chronological Order of *Asbestos* trial exhibits.	Asa960-983
Report to the Insurance Commissioners of New Jersey.	Asa984-1026
Voorhees v. Preferred Mutual Insurance Company, No. A-58 (Sept. Term 1991), slip op. (N.J. June 17, 1992).	Asa1027-1053
SL Industries v. American Motorists Ins. Co., 248 *N.J. Super,* 458 (App. Div. 1991), aff'd No. A-80 (Sept. Term 1991), slip. op. (N.J. June 17, 1992).	Asa1054-1089
Prefatory Statement to Volume IV	Asa1090-1091
Index: (a) "Initial ISO Documents"	Asa1092
Index: (b) "Morton's Internal Files"	Asa1093
Index: (c)(1) "Industry-Wide ISO Documents Morton Copied"	Asa1094-1098
Index: (c)(2) "Industry-Wide ISO Documents Morton Did Not Copy"	Asa1099
Index: (d) "Katz Deposition"	Asa1100-1101

Index: (e)(1) "Bruton Deposition-Morton III" (e)(2) "Bruton Affidavit-Morton III" (e)(3) "Bruton Multi-Case Deposition and Affidavit"	Asa1102-1103
Index: (f) "Aetna's Production"	Asa1104-1106
Index: (g) "Broker Documents"	Asa1107
Index: (h) "Consolidated Asbestos Coverage Litigation"	Asa1108
Citation Reference Pa1349-1351; Pa1347	Asa1109
5/15/70 Circular – **MTI Source: (a)**	Asa1110-1112
5/15/70 Circular – **MTI Source: (e)(1)**	Asa1113-1115
5/15/70 Circular – **MTI Source: (f)**	Asa1116-1122
Citation Reference Asa375-383	Asa1123
2/1/66 Explanatory Memorandum of Changes – **MTI Source: (c)(1)**	Asa1124-1132
2/1/66 Explanatory Memorandum of Changes – **MTI Source: (f)**	Asa1133
Citation Reference Asa101-104; Pa1710-1715	Asa1134
11/1/71 Explanatory Memorandum of Changes – **MTI Source: (a)**	Asa1135-1144

11/1/71 Explanatory Memorandum of Changes – **MTI Source: (c)(2)**	Asa1145-1154
11/1/71 Explanatory Memorandum of Changes – **MTI Source: (f)**	Asa1155-1164
Citation Reference Asa265-266	Asa1165
3/17/70 Agenda & Minutes – **MTI Source: (a)**	Asa1166-1169
3/17/70 Agenda & Minutes – **MTI Source: (c)(1)**	Asa1170-1171
3/17/70 Agenda & Minutes – **MTI Source: (e)(1)**	Asa1172-1173
3/17/70 Agenda & Minutes – **MTI Source: (e)(2)**	Asa1174-1176
3/17/70 Agenda & Minutes – **MTI Source: (e)(3)***	Asa1177-1179
3/17/70 Agenda & Minutes – **MTI Source: (f)**	Asa1180-1181
Citation Reference Asa268-270	Asa1182
3/20/70 Memo from Hansen to Daries – **MTI Source: (e)(1)**	Asa1183-1185
3/20/70 Memo from Hansen to Daries – **MTI Source: (e)(2)**	Asa1186-1189
3/20/70 Memo from Hansen to Daries – **MTI Source: (e)(3)**	Asa1190-1193
3/20/70 Memo from Hansen to Daries – **MTI Source: (f)**	Asa1194-1196

---

* Each (e)(2) and (e)(3) MTI Source document includes the Caption page of Bruton's Affidavit or Deposition.

Citation Reference Asa272-274	Asa1197
4/15/70 Agenda & Minutes – **MTI Source: (c)(1)**	Asa1198-1200
4/15/70 Agenda & Minutes – **MTI Source: (e)(2)**	Asa1201-1204
4/15/70 Agenda & Minutes – **MTI Source: (e)(3)**	Asa1205-1208
4/15/70 Agenda & Minutes – **MTI Source: (f)**	Asa1209-1211
Citation Reference Asa276-278	Asa1212
4/17/70 Memo from Hansen to Daries – **MTI Source: (e)(2)**	Asa1213-1216
4/17/70 Memo from Hansen to Daries – **MTI Source: (f)**	Asa1217-1219
Citation Reference Asa280-283	Asa1220
4/22/70 Letter form Earle to Bruton – **MTI Source: (c)(1)**	Asa1221-1224
4/22/70 Letter form Earle to Bruton – **MTI Source: (e)(2)**	Asa1225-1229
4/22/70 Letter form Earle to Bruton – **MTI Source: (e)(3)**	Asa1230-1233
4/22/70 Letter form Earle to Bruton – **MTI Source: (f)**	Asa1234-1236
Citation Reference Asa285-286	Asa1237

4/27/70 Memo from Hall to Lukens – **MTI Source: (e)(2)**	Asa1238-1240
Page intentionally left blank	Asa1241
4/27/70 Memo from Hall to Lukens – **MTI Source: (f)**	Asa1242-1243
Citation Reference Asa288-291	Asa1244
5/1/70 Letter from Bruton to Earle – **MTI Source: (c)(1)**	Asa1245-1246
5/1/70 Letter from Bruton to Earle – **MTI Source: (e)(1)**	Asa1247-1250
5/1/70 Letter from Bruton to Earle – **MTI Source: (e)(2)**	Asa1251-1255
5/1/70 Letter from Bruton to Earle – **MTI Source: (e)(3)**	Asa1256-1260
Page intentionally left blank	Asa1261
5/1/70 Letter from Bruton to Earle – **MTI Source: (f)**	Asa1262-1269
Citation Reference Asa293-295	Asa1270
5/5/70 Letter from Bruton to Nachman – **MTI Source: (c)(1)**	Asa1271-1273
5/5/70 Letter from Bruton to Nachman – **MTI Source: (e)(2)**	Asa1274-1277
5/5/70 Letter from Bruton to Nachman – **MTI Source: (e)(3)**	Asa1278-1281
5/5/70 Letter from Bruton to Nachman – **MTI Source: (f)**	Asa1282-1284

Citation Reference Asa297	Asa1285
6/2/70 Letter from Earle to Bruton – **MTI Source: (c)(1)**	Asa1286
6/2/70 Letter from Earle to Bruton – **MTI Source: (e)(2)**	Asa1287-1288
6/2/70 Letter from Earle to Bruton – **MTI Source: (e)(3)**	Asa1289-1290
6/2/70 Letter from Earle to Bruton – **MTI Source: (f)**	Asa1291
Citation Reference Asa299	Asa1292
6/5/70 Letter from Bruton to Earle – **MTI Source: (c)(1)**	Asa1293
6/5/70 Letter from Bruton to Earle – **MTI Source: (e)(2)**	Asa1294-1295
6/5/70 Letter from Bruton to Earle – **MTI Source: (e)(3)**	Asa1296-1297
6/5/70 Letter from Bruton to Earle – **MTI Source: (f)**	Asa1298
Citation Reference Asa358-364	Asa1299
4/17/61 Letter from Katz to Earle – **MTI Source: (d)**	Asa1300-1305
4/17/61 Letter from Katz to Earle – **MTI Source: (f)**	Asa1306-1312
Citation Reference Asa365-374	Asa1313

9/19-20/61 Meeting – **MTI Source: (d)**	Asa1314-1323
9/19-20/61 Meeting – **MTI Source: (f)**	Asa1324-1332
Citation Reference Asa447	Asa1333
6/24/70 Kentucky Order – **MTI Source: (c)(1)**	Asa1334
6/24/70 Kentucky Order – **MTI Source: (f)**	Asa1335
Citation Reference Asa465-467	Asa1336
6/23/70 Circular – **MTI Source: (c)(1)**	Asa1337-1339
6/23/70 Circular – **MTI Source: (f)**	Asa1340-1342
Citation Reference Asa560-561	Asa1343
Schmalz Article (undated) – **MTI Source: (c)(1)**	Asa1344-1345
Schmalz Article (undated) – **MTI Source: (d)**	Asa1346-1347
Schmalz Article (undated) – **MTI Source: (f)**	Asa1348-1349
Citation Reference Asa823-837	Asa1350
5/2-4/61 Minutes – **MTI Source: (c)(1)**	Asa1351-1365

5/2-4/61 Minutes – **MTI Source: (d)**	Asa1366-1380
5/2-4/61 Minutes – **MTI Source: (h)**	Asa1381-1399
Citation Reference Asa838-844	Asa1400
5/31/62 Letter from Nachman to GLRC – **MTI Source: (c)(1)**	Asa1401-1407
5/31/62 Letter from Nachman to GLRC – **MTI Source: (d)**	Asa1408-1414
5/31/62 Letter from Nachman to GLRC – **MTI Source: (h)**	Asa1417-1423
Citation Reference Asa846-849	Asa1422
10/10-11/62 Minutes – **MTI Source: (d)**	Asa1423-1426
10/10-11/62 Minutes – **MTI Source: (c)(1)**	Asa1427-1433
Citation Reference Asa850-857	Asa1434
11/18/63 MIRB Proceedings – **MTI Source: (c)(2)**	Asa1435-1443
11/18/63 MIRB Proceedings – **MTI Source: (d),(h)**	Asa1444-1452
Citation Reference Asa858-862	Asa1453
Exhibit I – **MTI Source: (c)(1)**	Asa1454-1458

Exhibit I – **MTI Source: (d)**	Asa1459-1467
Exhibit I – **MTI Source: (f)**	Asa1468-1470
Page intentionally left blank	Asa1471
Citation Reference Asa871-886	Asa1472
8/31/66 Letter from Katz to Bauer – **MTI Source: (d)**	Asa1473-1477
8/31/66 Letter from Katz to Bauer – **MTI Source: (f)**	Asa1478-1482
8/31/66 Letter from Katz to Bauer – **MTI Source: (h)**	Asa1483-1487
Citation Reference Asa919-920	Asa1488
10/28/65 Letter from Earle to Parker – **MTI Source: (c)(1)**	Asa1489-1490
10/28/65 Letter from Earle to Parker – **MTI Source: (d)**	Asa1491-1492
Citation Reference Asa921-941	Asa1493
Schoen Article (2/61) – **MTI Source: (d)**	Asa1494
Schoen Article (2/61) – **MTI Source: (h)**	Asa1495-1496
Schoen Article (2/61) – **MTI Source: (c)(1)**	Asa1497-1498

Citation Reference Asa942-950	Asa1499
7/19-20/61 Minutes GLRC – **MTI Source: (c)(1)**	Asa1500-1508
7/19-20/61 Minutes GLRC – **MTI Source: (d)**	Asa1509-1517
5/5/92 Notice of Motion of New Jersey State League of Municipalities to Appear as *Amicus Curiae*	Asa1518-1520
Brief of *Amicus Curiae* New Jersey League of Municipalities	Asa1521-1522

SUPREME COURT OF NEW JERSEY

Docket No. 34,341

Plaintiff(s) - Appellant/Petitioner	)
MORTON INTERNATIONAL, INC.,	)
vs.	)
Defendant(s) - Respondents/Cross-Petitioners	)
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.	)

BRIEF OF *AMICUS CURIAE* AETNA CASUALTY & SURETY COMPANY

STATEMENT OF THE ISSUES

Aetna is firmly committed to the proposition that the policy language in dispute is clear and unambiguous. No extrinsic evidence is required to demonstrate its plain meaning. Aetna is aware, however, that, like plaintiff (also sometimes referred to as "Morton", "Morton Thiokol", "Thiokol" or "MTI") herein, policyholder litigants and *amici curiae* cite out of context excerpts of extrinsic evidence, including the "drafting" and "regulatory" histories of the CGL policies, and cases referring to

such excerpts. Aetna has compiled a full history demonstrating the true import and complete context of such extrinsic evidence. To the best of Aetna's knowledge, it has never before been presented to any state Appellate or Supreme Court.

* * *

Respectfully submitted,

/s/ Victor C. Harwood, III
Victor C. Harwood, III
Brian J. Coyle
Edward Zampino
HARWOOD LLOYD
Counsel for Amicus Curiae,
Aetna Casualty & Surety
Company

HARWOOD LLOYD

COUNSELLORS AT LAW

July 21, 1992

Honorable Justices of the
Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, NJ 08625

RE: Morton International, Inc. v. General Accident
Docket No. 34,341

To The Honorable Justices of the New Jersey Supreme Court:

R. 2:6-11(d) authorizes the filing of a letter regarding recent relevant cases. Policyholder *amici* briefs have cited and rely quite heavily upon the recent case of *Joy Technologies v. Liberty Mutual*, No. 20153 (W. Va. Supreme Ct., June 11, 1992).[1] That case placed great emphasis upon a Declaration submitted by former Insurance Commissioner, Samuel H. Weese, in 1988 (slip op. at 15) in reaching its conclusion that insurance representatives represented to the commissioner that the pollution exclusion only clarified and restated occurrence coverage. Such Declaration is stated to vindicate *Broadwell* and " . . . proves the correctness of its holdings . . . "[2]

The Court should be made aware of on-going developments in the *Joy Technologies* case. On July 7, 1992,

---

[1] Brief of *amici* Allied-Signal, Inc., at 43, 47, 50, 54, 55-56, 58; brief of *amicus* League of Municipalities, at 32, 35 n.36, 36-37 n.37, 40, 44-46.

[2] Brief of *amicus*, League, at 44.

former Commissioner Weese submitted a new affidavit (copy enclosed herewith). Liberty Mutual, defendant in *Joy*, has filed that affidavit with the West Virginia Supreme Court in support of its Petition for Rehearing. Liberty Mutual pointed out in its Petition that Weese stated his 1988 affidavit " . . . does not accurately reflect his recollection or the extent of his involvement in the hearing."[3] This affidavit was publicly published and editorially commented upon in 6 *Mealey's Insurance Litigation Reports* No. 35 (July 21, 1992).

Weese's July 7, 1992, affidavit is also submitted herewith for inclusion in Aetna's supplemental appendix as page Asa1523 in further support of Aetna's motion for leave to expand the record filed with this Court on June 26, 1992, which motion is presently pending unheard.

Respectfully submitted,

/s/ Victor C. Harwood, III
Victor C. Harwood, III

---

[3] Petition of Liberty Mutual, at 5.

AFFIDAVIT

I, Samuel H. Weese, do depose as follows:

1. From 1969 to 1975, I held the position of Insurance Commissioner of West Virginia. In July of 1970, a hearing was held regarding the effect of various exclusions offered for approval including the qualified "sudden and accidental" pollution exclusion submitted by the Mutual Insurance Rating Bureau and the Insurance Rating Board.

2. I did not actively participate at the hearing or in the pre-hearing or post-hearing filing process. Although present at the hearing, as Insurance Commissioner, I appropriately delegated the filing process to others. I was not involved in the discussions of the legal complexities underlying the coverages provided by the policies as amended by the addition of the proposed pollution exclusion. I recall entering the hearing with the belief that coverage was generally excluded for normal operational polluting events and premiums charged did not reflect such coverage under the 1966 CGL policy. I also recall leaving the hearing with an assumption that, with the addition of the pollution exclusion, there continued to be no general coverage for normal operational polluting events. Therefore, without additional analysis, I assumed that the exclusion did not alter coverage, as none was intended initially.

3. The affidavit executed by me on November 11, 1988 in the *FMC v. Liberty Mutual* case does not accurately reflect my recollection as it tends to suggest that my involvement was extensive and that my memory of events was clear. In fact, my involvement was minimal and my recollection is only that there was generally no coverage for polluting events. To go further

would be to misrepresent my involvement in and my memory of such events.

4. In 1970, I understood that a "sudden" event was one which was identifiable in time and place. I also knew that an "accident" was an insurance term which contained a "sudden" element. In addition, I understood that the language of the occurrence definition focused upon unexpected or unintended damage.

5. The fact that the pollution exclusion was approved in West Virginia only as applicable to new or renewal policies and could not be attached to existing policies tends to indicate that the exclusion was generally perceived as a restriction.

/s/ Samuel H. Weese
SAMUEL H. WEESE

Dated: July 7, 1992
/s/ Mary Ann Brunett
Notary Public

APPENDIX E

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	:
Plaintiff-Petitioner,	:
v.	:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:
Defendants-Respondents.	:

PETITIONER'S BRIEF IN RESPONSE TO RESPONDENTS'/CROSS-APPELLANTS' BRIEF ON POLLUTION EXCLUSION AND "DAMAGES" CLAUSES

PRELIMINARY STATEMENT

The carriers ask this Court to believe that when they imposed the pollution exclusion clause in 1970, without fanfare and without the reduction of so much as one dollar of premium to the insureds, they intended to revolutionize the coverage afforded pollution risks so that the vast majority of pollution claims would for the first time be uninsurable. They have convinced some courts throughout the country of this intention, but they have not convinced New Jersey courts since 1975, nor have

they convinced either the trial court or the Appellate Division in this case.

New Jersey's consistent body of reported case law supporting the Appellate Division's construction of the "pollution exclusion" clause (*see, Broadwell Realty v. Fidelity and Casualty Co. of New York*, 218 N.J. Super. 516 (App. Div. 1987)) is compelling in its reasoning because it is driven by the principle, reaffirmed repeatedly by this Court, that policy language supporting more than one reasonable interpretation must be construed in favor of coverage. Although recognizing this controlling principle of construction, the carriers nonetheless argue, in the face of clearly conflicting evidence, that this Court should limit the broad policy language to one narrow meaning.

To reach the result urged by the carriers, this Court will have to ignore the abundant evidence considered by *Broadwell* and other courts, including: that the primary dictionary definition of "sudden" is unexpected; that insurance industry drafting precedent supports this interpretation of "sudden"; that the insurance industry's filings before state regulatory boards and the carriers' own representations characterized the pollution exclusion clause as a mere clarification of existing coverage.

* * *

That the pollution exclusion may be reasonably interpreted to support Morton's position is further confirmed by contemporaneous statements made by representatives of the insurance industry when the pollution exclusion

was promulgated.[9] The Appellate Division researched and reviewed statements of the Insurance Rating Board, the carriers' policy drafting group, that the pollution exclusion was merely a clarification of the occurrence definition, *Broadwell*, 218 N.J. Super. at 534 n.1. Based in part upon these contemporaneous interpretations by the carriers, the Appellate Division concluded that the phrase "sudden and accidental" must be interpreted as a restatement of the definition of occurrence in order to protect the reasonable expectations of the insured. 218 N.J. Super. at 536. Other courts have noted,

> [t]hat insurers publicly marketed the exclusion as a clarification, rather than a restriction of coverage, further indicates that "sudden and accidental" may mean, as the County suggests, unexpected and unintended. At the very least, we think that such comments on the part of the insurers corroborate the County's claim that the phrase is ambiguous.

New Castle, 933 F.2d at 1198.

Similarly, the Supreme Court of Georgia looked to the contemporaneous interpretations of the insurance industry when it determined that the phrase "sudden and accidental" was coextensive with "unexpected and unintended." *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 689 (1989). *See also Diamond Shamrock*, ___ N.J. Super. at ___ (slip op. at 47-48), where the court

---

[9] Some of the insurance industry's contemporaneous interpretations of that new form, suggesting its purpose was clarification, were presented to Judge Huot as part of the various cross-motions for summary judgment and are part of the record on this appeal (Pa 1341-1354; 1706-1724).

referred to contemporaneous public statements made by *amicus* Aetna as disclosing Aetna's "common understanding of the meaning of the standard pollution exclusion [as being] in accordance with *Broadwell.*"

The carriers' interpretation of the pollution exclusion clause as a mere clarification of the occurrence definition is further evidenced by the lack of any reduction in premiums when the clause was added to the policies. Had the pollution exclusion been drafted with the intent to substantially reduce or eliminate coverage, as Respondents now argue, clearly some reduction in premium would have accompanied its introduction.

Respondents attempt to shield the contemporaneous interpretations of their own industry from this Court by arguing that such extrinsic evidence may not be used to alter or vary the terms of the insurance contracts.[10] This argument is not only misleading, it is wrong as a matter of law. While it is true that extrinsic evidence is not

---

[10] The defendants also argue that extrinsic evidence is never admissible to demonstrate a party's subjective intent, relying upon *Saul v. Midlantic Nat'l Bank/South*, 240 N.J. Super. 62 (App. Div.), *certif. denied*, 122 N.J. 319 (1990), and *Kook v. American Sur. Co. of New York*, 88 N.J. Super. 43 (App. Div. 1965). This line of cases is inapposite to the case at bar. In both *Saul* and *Kook*, a party to the contract was attempting to introduce evidence of *its own* unexpressed subjective intent. The courts in both cases correctly held that such unexpressed intentions were irrelevant to the interpretation of the contract. *Saul*, 240 N.J. Super. at 77; *Kook*, 88 N.J. Super. at 48. In the instant case, the relevant extrinsic evidence relates to the objective understanding of the parties as documented in the express representations of the insurance industry to various regulatory bodies and the public at large.

normally admitted to alter or vary the terms of an unambiguous contract, this Court has long held that extrinsic evidence may be used to interpret the terms of a contract, noting that "[s]urrounding circumstances" may shed light on the intent of the contracting parties. *Communication Workers of America, Local 1087 v. Monmouth County Bd. of Social Servs.*, 96 N.J. 442, 452 (1984); *Atlantic Northern Airlines v. Schwimmer*, 12 N.J. 293, 302 (1953); *Harker v. McKissock*, 12 N.J. 310, 322-23 (1953). This interpretive function is especially important when dealing with complex insurance contracts that, as this Court has noted, are often difficult to understand. *Sparks*, 100 N.J. at 335.[11] Thus, this Court is entitled to look to the insurance industry's contemporaneous interpretations of the exclusion in the record and to the public material contained in reported cases and published reference sources, and in so doing confirm that the phrases "sudden and accidental" and "discharge, dispersal, release or escape" are susceptible to more than one meaning.

Respondents argue that those courts that have considered the statements of the insurance industry interpreting the pollution exclusion clause as a clarification of

---

[11] We note that *amicus curiae*, Aetna, argues for the inclusion of this material. Counsel's Certification in Support of Motion for Leave to Appear as *Amicus Curiae* at ¶11. Whether this conflict results from strategy or concern over the state of the extrinsic evidence itself, the disagreement only serves to reinforce the inherent ambiguity of the standard form exclusion. This Court has gone so far as to hold that, with regard to insurance contracts, resort to extrinsic evidence is proper even in the face of an unambiguous insurance policy. *Werner Industries v. First State Ins. Co.*, 112 N.J. 30, 39 (1988).

existing coverage were misled. They suggest that there is *other* evidence indicating some members of the industry intended the exclusion to limit coverage. Respondents' Brief at 44 n. 29. Regardless of the underlying validity of their argument, in so arguing Respondents concede the point. That the pollution exclusion clause was interpreted differently by members of the insurance industry, and that one of these interpretations supports Morton's position, is irrefutable proof that the clause is susceptible to more than one reasonable interpretation and should be construed so as to favor coverage.

* * *

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for Plaintiff-Petitioner,
Morton International, Inc.

/s/ Edward C. Laird
GEORGE F. KUGLER, JR.
EDWARD C. LAIRD

Dated: June 8, 1992

OF COUNSEL

Thomas C. Hill
Taft, Stettinius & Hollister

ON THE BRIEF:

GARY J. LESNESKI

APPENDIX F

MORTON INTERNATIONAL, INC.,	:	SUPREME
	:	COURT
Plaintiff-Petitioner	:	OF NEW
	:	JERSEY
v.	:	DOCKET NO.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:	34,341
	:	
Defendants-Respondents	:	

BRIEF AMICI CURIAE OF ALLIED-SIGNAL, INC., THE AMERICAN FIBER MANUFACTURERS ASSOCIATION, THE AMERICAN PETROLEUM INSTITUTE, ARMSTRONG WORLD INDUSTRIES, INC., ATHLONE INDUSTRIES, INC., THE BOC GROUP, INC., THE CHEMICAL MANUFACTURERS ASSOCIATION, FLINTKOTE CO., HANSON INDUSTRIES, INTERNATIONAL BUSINESS MACHINES CORPORATION, J. T. BAKER, INC., NESTLE FOOD COMPANY, OLIN CORPORATION, OWENS-ILLINOIS, INC., PUBLIC SERVICE ELECTRIC & GAS COMPANY, REICHHOLD CHEMICALS, INC., ROHM AND HAAS COMPANY, SAFETY LIGHT CORPORATION, SANDVIK, INC., SCHERING-PLOUGH CORPORATION, USR INDUSTRIES INC., WARNER-LAMBERT COMPANY, WASTE MANAGEMENT, INC., AND WESTINGHOUSE ELECTRIC CORPORATION

---

* * *

Fortunately, we now have received, within just the last week or so, the authoritative answer of the West Virginia Supreme Court of Appeals to any such argument. *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, No.

20153 (W. Va. June 11, 1992). . . . The West Virginia high court looked closely at the history we have recited, including of course particularly the West Virginia documents. It found unequivocally that the insurance groups that represented Liberty Mutual, the insurer before the court in the *Joy Technologies* case (and a party to this appeal), had "unambiguously and affirmatively represented to the West Virginia Insurance Commission that the [pollution exclusion] did not alter coverage under the policies involved" – coverage that extended to pollution damage "even if it resulted over a period of time and was gradual, so long as it was not expected or intended." Addendum B, slip op. at 17. Elsewhere the court spoke of Liberty Mutual as having made "studied unambiguous, official and affirmative representations" inconsistent with the temporal meaning attributed to the "sudden" of the pollution exclusion by an intermediate appellate court in Pennsylvania,[74] whose law Liberty Mutual was urging should be applied. *Id.* at 10. In those circumstances, the court said, to apply Pennsylvania law "would be inconsistent with, and contrary to, the public policy of this State." *Id.* The court's response to the latter-day insurance company argument thus was categorical: The insurance companies represented that the exclusion was a mere clarification and did not alter coverage; the state's insurance commissioner approved the pollution exclusion we are concerned with (and another not relevant to this case)

---

[74] *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 383 Pa. Super. 558, 576-77, 557 A.2d 393, 402 (1989) (holding that the exclusion is unambiguous).

"only 'to the extent that said exclusions are mere clarifications of existing coverages,' " *Id.* at 17, and no insurance company was going to be allowed to avoid the effect of its "studied, unambiguous, official and affirmative" representations. Even the insurers cannot seriously contend that the standard form pollution exclusion was intended to mean one thing in West Virginia – a mere clarification of coverage – and something else, a huge cutback in coverage, in all the other states, including New Jersey.

C. EPA and NJDEP Regulations Referred to by the Insurers Are Irrelevant to the Question of the Meaning of a Provision in a Private Contractual Insurance Agreement.

The insurers refer to certain United States Environmental Protection Agency and New Jersey Department of Environmental Protection regulations (which distinguish between "sudden" and "gradual" occurrences) as "highly relevant" to the question of the meaning of the word "sudden" in the comprehensive general liability policy. (INA Cross-App. Br. 24-28.) . . .

The regulations are further irrelevant in that they were promulgated in the late 1970s and early 1980s, years after the pollution exclusion was developed and approved. Any such regulations could be relevant only if they shed light on a usage current at the time the pollution exclusion was approved. And, as was shown above (pp. 11-14), when the industry presented the pollution exclusion to state regulatory authorities in the early 1970s, it said it did not mean the word "sudden" to have

a durational connotation, and such a connotation had not been a part of the industry's usage of the term. Because the state regulatory authorities relied on the industry's representations, the insurers are bound by what they said at that time. *See supra* note 67. The West Virginia Supreme Court of Appeals has just reminded us that no more than anyone else are insurers allowed to escape the force of "studied, unambiguous, official and affirmative" representations on which they mean public authorities to rely. (*See supra* pp. 55-56.)

* * *

/s/ Clyde A. Szuch/dwk
CLYDE A. SZUCH
DONALD W. KIEL

Pitney, Hardin, Kipp & Szuch

Attorneys for The American Fiber Manufacturers Association, The American Petroleum Institute, The Chemical Manufacturers Association, International Business Corporation, Olin Corporation and Rohm and Haas Company

APPENDIX G

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,

Defendants-Respondents.

AMENDED BRIEF OF *AMICUS CURIAE* NEW JERSEY LEAGUE OF MUNICIPALITIES

---

* * *

C. The Insurance Industry Sought Approval of the Exclusion Clause on the Basis That it Was Only Clarification of Existing Coverage.

The IRB and the National Bureau submitted the polluter's exclusion to state insurance commissioners for approval.[36] The insurance industry specifically represented

---

[36] Although the actual industry filings in New Jersey are not in the record below, the insurance companies have brought them into question by seeking to challenge *Broadwell*. Copies of the original filing by the Mutual Insurance Rating Bureau have

to insurance commissioners that the exclusion was intended merely as a clarification of the "occurrence" definition, and that coverage was excluded only for intentional pollution:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.[37]

---

been obtained from the New Jersey Department of Insurance and have been attached to this brief. (*See* Appendix, Exhibit J). It is believed that this Court can take judicial notice of these public records. If not, there is ample evidence from which the court can conclude that the language set forth above was submitted in identical form to all state insurance commissioners, including New Jersey's. *See e.g., New Castle County v. Hartford Accident and Indem.*, 933 F.2d 1162, 1198 (setting forth language identical to that quoted above and describing it as "the standard explanatory memorandum submitted to state insurance commissioners"). This Court can take judicial notice that the same language and explanation was filed with insurance commissioners across the Country. *See* N.J. Evid. R. 9(1) and Evid. R. 12; *See also Joy Technologies, supra* (setting forth the identical language in the West Virginia filings).

[37] Of significance herein, the West Virginia Supreme Court recently applied the principles of judicial estoppel for Liberty Mutual from taking positions on the "polluter's exclusion" *identical* to the one's that Liberty is taking in this matter:

> Certainly, in this Court's view, an essential part of the public policy of the State of West Virginia is that the

The first sentence of the IRB and MIRB submission to the state insurance commissioners is false. That first sentence reads:

> law of the State should be administered in such a way as to insure that foreign corporations which seek to do business in West Virginia *act in a manner consistent* with their *studies, unambiguous, official,* affirmative *representations to the State, its subdivisions, or its regulatory bodies.*
>
> As will hereinafter be discussed, this Court believes that Liberty Mutual Insurance Company, in studied, affirmative and official communications with a regulatory authority of the State of West Virginia, prior to the institution of this action, took the position that the exclusion in question in the present case would have a meaning and effect different from that attributed to it by the State of Pennsylvania. In view of this, if this Court held that Pennsylvania law applied to the questions in issue, it would allow Liberty Mutual Insurance Company to take a position [that the "pollution's exclusion" barred coverage for gradual pollution, even if the injury was unexpected and unintended], and act in a manner, *inconsistent with Liberty Mutual's studied, unambiguous, official and affirmative representations.* Such, in this Court's view, would be inconsistent with, and *contrary to, the public policy of this state.*

Joy Technologies, supra, slip op. at 10 (emphasis added). Similarly, Liberty Mutual and the other insurance companies that took part in the filings submitted to New Jersey *or* West Virginia should be estopped from taking a position here that is inconsistent with these prior representations made to the commissioners that the "exclusion was a mere clarification of existing coverage. *See N.M. v. J.G.*, 255 *N.J. Super.* 423, 605 *A.*2d 709 (App. Div. 1992); *Stretch v. Watson*, 6 *N.J. Super.* 456, 69 *A.*2d 596 (Ch. Div. 1949) (parties should not be allowed to play "fast and loose" with the courts).

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence.

Clearly, as the drafter, G.L. Bean's own statement's, *supra*, indicate, pollution coverage was provided for prior to 1970.

Even a pro-insurance industry article recognizes that the "occurrence" policy covered gradual pollution losses:[38]

> With the lesson of accident-based coverage fresh in their minds, [in 1966] the insurers *used new language* to remove only the suddenness barrier and *to cover pollution liability that arose from gradual losses.* The standard policy made it clear that the loss had to be unexpected and unintended from the insured's standpoint for coverage to apply.

Rosenkranz at 1247. (footnote omitted, emphasis added.)

* * *

Respectfully submitted,

OF COUNSEL

EUGENE R. ANDERSON
JOHN A. MacDONALD
(On the Brief)
ANDERSON KILL OLICK
& OSHINSKY

RALPH J. KMIEC

MICHAEL A. PANE

FRED G. STICKEL, III
STICKEL, KOENIG & SULLIVAN
ATTORNEY FOR NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

/s/ Fred G. Stickell III
FRED G. STICKEL, III

[38] Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 Geo. L.J. 1237 (1986).

APPENDIX H

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	
Plaintiff-Appellant,	
vs.	
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,	
Defendants-Respondents.	

REPLY BRIEF OF DEFENDANT-RESPONDENTS/ CROSS-APPELLANTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES

* * *

1. The "Regulatory History" Documents Relied On By Thiokol Support The Positions Taken By The Carriers

Thiokol relies on the regulatory filing history discussions in *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991) and *Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989),

to support its position that the pollution exclusion is ambiguous. The documents relied on in these cases were submitted by the Insurance Rating Board ("IRB") in connection with the 1970 filing of the pollution exclusion with the various state insurance departments. The IRB submissions contained an explanatory memorandum which was filed in most states. The memorandum provides in relevant part:

> *Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended* and thus are excluded by the definition of occurrence. *The above exclusion clarifies the situation so as to avoid any question of intent.* Coverage is continued for pollution or contamination caused by injuries where the pollution or contamination results from an accident. . . .

New Castle, 933 F.2d at 1198 (emphasis added).

The very first sentence of the explanation confirms the insurers' belief in 1970 that most incidents of pollution were not currently covered by the occurrence policies. It belies Thiokol's claim that the carriers "intended to revolutionize the coverage afforded pollution risks so that the vast majority of pollution claims would for the first time be uninsurable." Pet. Br. at 1. The 1970 submissions were made at a time when liability was imposed only upon a finding of fault and only after a third party had been injured as a result of that fault. Ten years later, CERCLA and comparable state statutes imposing strict liability brought about a flood of pollution claims which

were unforeseen at the time of the filings. Any predictions made in 1970 should be evaluated in light of what was known at the time.

The second sentence of the explanation reinforces the drafters' understanding that the exclusion would result in a change by doing away with the question of intent. The initial focus of the coverage determination would now be on a physical event, the discharge of contaminants, instead of policyholder intent. If that discharge was not sudden, the inquiry could be terminated without venturing into the more complex question of intent.

The final sentence confirms the drafters' intent that the exclusion applies to the classic temporal "accident" which was understood to be a sudden event identifiable in time, such as a "boom" incident. Indeed, the regulatory history documents submitted to Judge Huot by Thiokol indicate that the insurers used the term "accident" to suggest a temporal element. Pa 1710. Thiokol's historical submissions state that in 1966 the IRB expanded the definition of occurrence because of criticism that the use of the term accident alone in the occurrence definition "required suddenness (a boom) as to time and place." *Id.*

The IRB documents submitted to the trial court by Thiokol also demonstrate that the pollution exclusion would effect a reduction in coverage. Indeed, the IRB indicated that on an individual basis policyholders could "buy-back" the coverage which the pollution exclusion eliminated from the policy. Pa 1344, 1716, 1724.

* * *

Broadwell and its progeny, including the recent West Virginia decision, *Joy Technologies*,[9] suggest that the proponents of the pollution exclusion are estopped from giving any real effect to the pollution exclusion because of one construction of certain isolated statements in the memorandum that was submitted in most jurisdictions.

* * *

---

[9] *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*, No. 20153 (W. Va. June 11, 1992), also failed to read carefully the language of the filing documents it relied on in concluding that the pollution exclusion was ambiguous. As in *New Castle*, the court focused solely on the word "clarifies" in the explanatory memorandum and ignored the remainder of the document which stressed that intent would no longer be an issue. Nor is there any indication that the court considered the large quantity of materials in the West Virginia Insurance Commissioner's file which directly contradict any claim that the insurers represented that the exclusion would be meaningless and strongly support the insurers' interpretation of the purpose and effect of the exclusion. *See, e.g., North Pacific Ins. Co. v. United Chrome Prods., Inc.*, No. CV 89-0777 (Or. App. Ct. Sept. 30, 1991) (Ra 2) (IRB document submitted to West Virginia "clearly indicates" intent to exclude pollution). Appellate courts which venture into making determinations on the basis of extrinsic evidence run grave risks of error and basic unfairness.

Dated: June 29, 1992

Respectfully submitted,

RONCA, MCDONALD & HANLEY

Of Counsel:
MENDES & MOUNT

Attorneys for Defendants-Respondents Underwriters at Lloyd's London, and London Market Insurance Companies

Of Counsel:
Robert J. Kovacs
John G. McAndrews

MUDGE ROSE GUTHRIE ALEXANDER & FERDON

By /s/ Cary Edwards
W. Cary Edwards

Attorneys for Defendant-Respondent Insurance Company of North America

Of Counsel:
Paul R. Koepff
John L. Altieri, Jr.
Stephen V. Kovarik

APPENDIX I

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	:
Plaintiff-Appellant,	:
v.	:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:
Defendants-Respondents.	:

BRIEF OF DEFENDANT-RESPONDENTS/CROSS-APPELLANTS AMERICAN HOME ASSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES IN SUPPORT OF *AMICUS* AETNA'S MOTION TO EXPAND THE RECORD BELOW

Because the pollution is clear and unambiguous, our view is that extrinsic evidence is inadmissible to vary the meaning of a contact. *See e.g., Massari v. Accurate Bushing Co.*, 81 N.J. 299, 315 (1951); *Filmlife, Inc. v. Mal "Z" Ena, Inc.*, 251 N.J.Super. 570, 573 (App.Div. 1991) (quoting 3 *CORBIN ON CONTRACTS*, 573 (1960)).

In this case, Thiokol and at least one *amicus* have cited to extrinsic evidence. These references have taken the evidence selectively and out of context. It is the

undersigned insurers position that the Aetna *amicus* brief and the appendices referenced thereto have given the Court a fair and complete picture of the derivation of the pollution exclusion. Should this Court or a lower court in remand wish to consider the issue of extrinsic evidence, the Aetna motion should be granted.

* * *

Dated: July 30, 1992

Respectfully submitted,

By: /s/ John G. McAndrews

RONCA, MCDONALD & HANLEY

Of Counsel:

MENDES & MOUNT

Attorneys for Defendants-Respondents Underwriters at Lloyd's London and London Market Insurance Companies

GOLDEN, ROTHSCHILD, SPAGNOLA & DiFAZIO

Attorneys for Defendant-Respondent American Home Assurance Company

Of Counsel:
Charles W. Miller, III

Of Counsel: Robert J. Kovacs
John G. McAndrews

APPENDIX J

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,

Defendants-Respondents.

INSURANCE COMPANY OF NORTH AMERICA'S JOINDER IN THE BRIEF OF DEFENDANT-RESPONDENTS/CROSS-APPELLANTS AMERICAN HOME ASSURANCE COMPANY, UNDERWRITERS AT LLOYD'S LONDON, AND LONDON MARKET INSURANCE COMPANIES IN SUPPORT OF *AMICUS* AETNA'S MOTION TO EXPAND THE RECORD BELOW

Defendant-Respondent/Cross-Appellant Insurance Company of North America respectfully submits this joinder in the Brief of Defendant-Respondents/Cross-Appellants American Home Assurance Company, Underwriter's at Lloyd's London, and London Market Insurance Companies in Support of *Amicus* Aetna's Motion to Expand the Record Below, filed on July 30, 1992. For the reasons set forth therein, Insurance

Company of North America requests that *Amicus* Aetna's motion to expand the record below be granted.

Dated: July 31, 1992

Respectfully submitted,

MUDGE ROSE GUTHRIE
ALEXANDER & FERDON

By: /s/ Cary Edwards
W. Cary Edwards

Attorneys for Defendant-
Respondent Insurance
Company of North America

Of Counsel: Paul R. Keopff
John L. Altieri, Jr.
Stephen V. Kovarik

APPENDIX K

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,
Plaintiff-Appellant,
vs.
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,
Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS/CROSS-APPELLANTS INSURANCE COMPANY OF NORTH AMERICA, AMERICAN HOME ASSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO THE MOTION BY THE STATE OF NEW JERSEY TO PARTICIPATE AS *AMICUS CURIAE* AND TO EXPAND THE RECORD

* * *

POINT II

THE MOTION TO EXPAND THE RECORD SHOULD BE DENIED SINCE THE EXTRINSIC EVIDENCE OFFERED IS INCOMPLETE AND UNNECESSARY TO INTERPRET THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE POLLUTION EXCLUSION

It is the insurers' position that the question of whether a contract is ambiguous, and the meaning of

unambiguous contracts, including insurance policies, must be determined from only the four corners of the contract. As noted in the insurers' opening brief and reply brief, it is improper and unnecessary to look at any extrinsic evidence to interpret a policy which can be understood by looking only at the policy itself. Since the phrase "sudden and accidental" in the context of the pollution exclusion is clear and unambiguous, the extrinsic evidence offered by the State is unnecessary to interpret the plain language of the exclusion.

A second basis for denying the State's motion to expand the record is that there is no proffer by the Attorney General that the documents offered represent the entire files maintained by the Insurance Department in connection with the regulatory materials. Incomplete or select portions of the Insurance Department's files will not provide an accurate picture of what the Department understood about the effect of the pollution exclusion. A cursory review suggests that the files are incomplete. For example, document numbers 31, 32 and 33 state that the Insurance Department requested a legal opinion, presumably from the Attorney General's office, before approving the pollution exclusion. The legal opinion is not among the documents offered by the State.

Finally, it is far too late in the day to be introducing new evidence. Simply admitting the documents as evidence will not resolve what their drafters intended or what the drafters of the pollution exclusion intended. The State's motion suggests that it intends to provide the Court with its interpretation of these documents. Even if extrinsic evidence were admissible, it is fundamentally unfair to let one side put its own gloss on the documents without allowing the other side an adequate opportunity

to challenge that interpretation in its briefs and, where appropriate, by taking testimony of the authors and recipients. This Court is not a trial court and it should not be lulled into becoming a finder of hotly contested factual issues that were never considered by the trial court, *i.e.* what particular documents mean.

This Court should not make a decision based on an incomplete or one-sided record. A court which resorts to extrinsic evidence should do so on a complete record fairly contested by the parties. Even where it is relevant and admissible, extrinsic evidence should not be considered unless all parties to the action have a full and fair opportunity to present and develop favorable evidence and rebut non-favorable evidence. That is why it is doubly unfair to admit extrinsic documentary evidence directly into an appellate record and to do so after the close of briefing by the parties.

* * *

Dated: September 14, 1992

GOLDEN, ROTHSCHILD SPAGNOLA & DiFAZIO

Attorneys for Defendant-Respondent American Home Assurance Company

Of Counsel: Charles W. Miller III

MANTA & WELGE

Attorneys for Defendant-Respondent Liberty Mutual Insurance Company

Of Counsel: John C. Sullivan

Respectfully submitted,

MUDGE ROSE GUTHRIE ALEXANDER & FERDON

By: /s/ Cary Edwards
W. Cary Edwards

Attorneys for Defendant-Respondent Insurance Company of North America

Of Counsel:
Paul R. Koepff
John L. Altieri, Jr.
Stephen V. Kovarik

SUPREME COURT OF NEW JERSEY

MORTON INTERNATIONAL, INC., *etc.*,

Plaintiff-appellant

vs

GENERAL ACCIDENT INSURANCE COMPANY, *et al.*,

Defendant-Respondents

DOCKET NO. 34,341

BRIEF ON BEHALF OF DEFENDANTS LONDON MARKET IN OPPOSITION TO MOTION BY STATE OF NEW JERSEY TO APPEAR *AMICUS CURIAE* AND TO SUPPLEMENT THE RECORD

POINT II

NO GROUND FOR SUPPLEMENTING THE RECORD HAS BEEN DEMONSTRATED BY MOVANT-AMICUS ATTORNEY GENERAL OF THE STATE OF NEW JERSEY.

In his motion for leave to appear as *amicus curiae*, the Attorney General of the State of New Jersey has also moved to supplement the record. This motion is the height of procedural hubris, and should be denied.

* * *

Respectfully submitted,

RONCA, McDONALD & HANLEY

BY: /s/ Robert J. Kovacs
ROBERT J. KOVACS

MENDES & MOUNT

BY: /s/ Kathleen B. Browne/DTK
KATHLEEN B. BROWNE
Attorneys for defendants
London Market

DATED: September 14, 1992

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant.

vs.

GENERAL ACCIDENT INSURANCE COMPANY, et al

Defendants-Respondents.

BRIEF OF DEFENDANTS AFFILIATED FM INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA AND CONTINENTAL CASUALTY COMPANY IN OPPOSITION TO THE MOTION BY THE STATE OF NEW JERSEY TO APPEAR *AMICUS CURIAE* AND TO EXPAND THE RECORD

---

* * *

Plaintiff further argues to the Court that Aetna should be denied leave to expand the record since the new information proffered is incompetent and irrelevant. . . . Defendants likewise contend that the materials sought to be introduced by the State are irrelevant to the issues on appeal.

* * *

Respectfully submitted,

PRIESTLEY, BARILE & WACHENFELD
Attorneys for Defendant/Respondent,
Affiliated FM Insurance Company

By: /s/ William S. Wachenfeld
WILLIAM S. WACHENFELD, ESQ.

SIFF ROSEN P.C.
Attorneys for Defendant/Respondent,
First State Insurance Company

By: /s/ Louis G. Adolfsen
LOUIS G. ADOLFSEN, ESQ.

MORGAN, MELHUISH, MONAGHAN, ARVIDSON,
ABRUTYN & LISOWSKI
Attorneys for Defendant/Respondent
General Accident Insurance Company of
America

By: /s/ Elliot Abrutyn
ELLIOT ABRUTYN, ESQ.

HASKELL & PERRIN
Attorneys for Defendant/Respondent,
Continental Casualty Company

By: /s/ Daniel P. Caswell
Daniel P. Caswell

Dated: September 14, 1992

APPENDIX L

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL INC.,

Plaintiff-Appellant,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,

Defendants-Respondents

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY

---

* * *

POINT III

THE INSURERS ARE BOUND BY THE EXPLANATION OF THE POLLUTION EXCLUSION CLAUSE THEY PROVIDED TO THE NEW JERSEY DEPARTMENT OF INSURANCE AND UPON WHICH THE DEPARTMENT RELIED TO APPROVE THE EXCLUSION.

---

* * *

Based upon these respective submissions the Commissioner of Insurance approved both the changes. The arguments of the insurers would, at least in the area of pollution insurance, reinsert a temporal requirement into the concept of an accident and refocus the inquiry on the intent to do the causative act rather than the intent to

cause the injury. The explanatory paragraph they submitted gives no hint that the insurers intended to step backward to the pre-1966 era when these issues were extensively litigated.

The Appellate Division found persuasive authority that the contemporaneous purpose of the pollution exclusion was to clarify the exclusion of coverage for the intentional polluter. *Broadwell Realty,* 218 *N.J. Super.* at 533-534. Regardless of the insurers' unspoken intent at the time they submitted this language, all the New Jersey Commissioner of Insurance had before him was the insurers' explanatory paragraph.

It would eviscerate the purposes of the ratemaking act to allow insurers to make a representation to the Department of Insurance that an exclusion leaves coverage unchanged and later receive the benefit of an interpretation that significantly reduces the risks covered.

* * *

Respectfully submitted,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Karen L. Jordan
Karen L. Jordan
Deputy Attorney General

Dated: 10/25/92

APPENDIX M

SUPREME COURT OF NEW JERSEY
DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

vs.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,

Defendants-Respondents.

BRIEF IN ANSWER TO *AMICUS CURIAE* BRIEF OF THE STATE OF NEW JERSEY

PRELIMINARY STATEMENT

This brief is submitted on behalf of the undersigned insurers in reply to the Brief *amicus curiae* of the State of New Jersey. Notwithstanding that the Court did not grant the Attorney General's motion to expand the record on appeal, the State filed a supplemental appendix containing 115 pages of extra record, so called extrinsic evidence (selectively chosen by the State) allegedly relating to the regulatory history of the pollution exclusion and the 1966 CGL policy forms. The State's brief, in turn, relies upon

its interpretation of those handpicked documents which were never before either of the courts below.

The Court should reject the State's offer of extrinsic evidence and its arguments which rely on that evidence. The meaning of the pollution exclusion can and should be derived from the four corners of the insurance policies. It is both unnecessary and inappropriate to expand the record with such selectively chosen extrinsic evidence. Use of this extrinsic evidence was not permitted by the trial court. It would be grossly unfair to do so at this late stage, especially when this is being done in the last brief submitted at the highest level of appellate review. Even if it were relevant and admissible, the extrinsic evidence selected by the State cannot fairly be received after appellate briefing is concluded and the parties are foreclosed from offering their own evidence. Even if the Court were to conclude that resort to extrinsic evidence is required, the matter should be remanded for an evidentiary hearing where all parties have a fair shot at offering evidence. *See* Point I, Section A, *infra*.

* * *

Dated: November 12, 1992

RONCA, MCDONALD & HANLEY

Of Counsel:
MENDES & MOUNT

Attorneys for Defendants-Respondents Underwriters at Lloyd's London, and London Market Insurance Companies

Of Counsel:
Robert J. Kovacs
John G. McAndrews

GOLDEN, ROTHSCHILD, SPAGNOLA & DiFAZIO

Attorneys for Defendant-Respondent America Home Assurance Company

Of Counsel:
Charles W. Miller III

Respectfully submitted,

MUDGE ROSE GUTHRIE ALEXANDER & FERDON

By /s/ Cary Edwards
W. Cary Edwards

Attorneys for Defendant-Respondent Insurance Company of North America

Of Counsel:
Paul R. Koepff
John L. Altieri
Stephen V. Kovarik

MANTA & WELGE

Attorneys for Defendant-Respondent Liberty Mutual Insurance Company

Of Counsel:
John C. Sullivan

APPENDIX N

ARCHER & GREINER

December 30, 1992

Gail G. Haney, Deputy Clerk
New Jersey Supreme Court
Hughes Justice Complex, CN 970
Trenton, New Jersey 08625

Re: Morton International, Inc. v. General Accident Insurance Company of America
Docket No. 34, 341
Our File No. MOR-072-814

Dear Ms. Haney:

In connection with the above-captioned matter, this will confirm your telephone request yesterday for provision of the following documents cited in the appendices of the respective parties which I enclose copies of herewith:

1. Harwood & Zampino, *The Emporer's Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence,* 6 Mealey's Insurance Litigation Reports No. 25 (Part One) (May 5, 1992) and 6 Mealey's Insurance Litigation Reports No. 26 (Part Two) (May 12, 1992)

2. Harwood & Zampino, *The Occurrence Definition And Extrinsic Evidence: The Diogenesian Search For The Reasonable Man,* 6 Mealey's Insurance Litigation Reports No. 31 (June 16, 1992)

3. Harwood & Zampino, *The West Virginia Regulatory Filings And Extrinsic Evidence Of The "History" Of The Pollution Exclusion,* 6

Mealey's Insurance Litigation Reports No. 47 (October 20, 1992)

4. Sayler, *The Dutch Boys At The Dike: The Apologists For The Polluter's Exclusion Run Out of Fingers*, 6 Mealey's Insurance Litigation Reports No. 32 (June 23, 1992)

5. Harwood & Zampino, *The "Frivolity" of Policyholder Gradual Pollution Discharge Claims*, 5 Mealey's Insurance Litigation Reports No. 40 (August 27, 1991)

6. Sayler, *The Emperor's Newest Clothes: Revisionism and Retreat: The Insurers' Last Word On The Pollution Exclusion*, 5 Mealey's Insurance Litigation Reports No. 46 (October 8, 1991)

7. Sayler & Zolensky, *Pollution Coverage and The Intent Of The CGL Drafters: The Effect Of Living Backwards*, 1 Mealey's Insurance Litigation Reports No. 57 (June 9, 1987)

By copy of this letter, I am advising all counsel of the Court's request for the production and our provision of the above-referenced materials.

Very truly yours,

ARCHER & GREINER
A Professional Corporation

By: /s/ Ellis I. Medoway
ELLIS I. MEDOWAY

HARWOOD LLOYD

January 15, 1993

HAND DELIVERED

Gail Haney, Deputy Clerk
Supreme Court of New Jersey
Hughes Justice Complex
CN-970
Trenton, NJ 08625

Re: Morton International v. General Accident

Dear Ms. Haney:

Thank you for calling on Friday, January 15, 1993. As you requested, enclosed please find copies of an article and a commentary from Mealey's Litigation Reports – Insurance. The article, entitled "Special Report: Pollution Exclusion Dissected in Hartford," was published on February 27, 1990 in Volume 4, Issue No. 8. The commentary, entitled "Insured Counsel Doubletalk: The Fallacies In Anderson And Passannante's Arguments Concerning The Interpretation of 'Sudden and Accidental' In Boiler And Machinery Policies," and written by James Johnstone and Frederick Ansell, was published on January 15, 1991, in Volume 5, Issue No. 10.

We are delivering this correspondence to Justice Stein's chambers, as you instructed, and will copy all counsel on this cover letter. If we can be of further assistance, please do not hesitate to call again. Thank you.

Very truly yours,

/s/ Brian R. Ade
BRIAN R. ADE

APPENDIX O

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,	:
Plaintiff-Appellant,	:
vs.	:
GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, *et al.*,	:
Defendants-Respondents.	:

PLEASE TAKE NOTICE that the undersigned insurers respectfully move the Court, pursuant to R. 2:11-6, for reconsideration of its July 21, 1993 decision in this matter. In support of the motion, movants will rely upon the accompanying Brief In Support Of Motion For Reconsideration and appendix thereto.

On July 26, 1993, the carriers moved for an order granting a thirty day enlargement of time to file a motion for reconsideration. That motion was orally granted by Justice Handler on July 30, 1993.

BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION

* * *

A. The Carriers Were Deprived Of Their Due Process Right To A Fair Evidentiary Hearing

The Court denied the insurers their Fourteenth Amendment rights to due process when it estopped the entire insurance industry from relying on the "literal terms" of the pollution exclusion without the opportunity to present a fully developed factual record and to rebut the evidence upon which the Court relied.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In *Fuentes*, the Supreme Court noted:

> [W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.

Id. at 81. The fundamental due process right to a hearing embraces the right to present evidence and to confront and to cross-examine adverse evidence. *Green v. McElroy*, 360 U.S. 474, 497 (1959).

> Certain principles have remained relatively immutable in our jurisprudence. . . . We have formalized these protections in the requirements of confrontation and cross-examination . . . This Court has been zealous to protect these rights from erosion . . . It has spoken out not only in criminal cases [cites omitted] . . . but also in all

> types of cases where administrative and regulatory actions were under scrutiny.

Id. at 496-97. The due process values embodied in Article I, paragraph 1 of the New Jersey Constitution require no less. *Ledezna v. A&C Drywall,* 254 N.J. Super. 613, 618 (App. Div. 1992).

Saunders v. Shaw, 244 U.S. 317 (1917), is directly on point with the facts of the present case. In *Saunders,* the Supreme Court reversed a decision by the Louisiana Supreme Court because the state's highest court had unconstitutionally denied a request for an evidentiary hearing on whether a parcel of property was subject to a tax assessment. *Id.* at 319. The state court had denied a hearing because it believed that the legality of the assessment "was so plain on the uncontroverted facts [and] . . . to remand [the case] would be an empty form – a mere concession to technicality." *Id.* Justice Holmes highlighted the constitutional infirmity in the state court's reasoning:

> It *may* turn out so, but we do not see in the record an *absolute warrant* for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

Id. (emphasis added).

As shown above, this Court erroneously assumed that the record contained all important evidence regarding the regulatory history of the pollution exclusion. The Court's determination that it would be "redundant" to remand the case for an evidentiary hearing violated the insurers' due process rights under the Fourteenth

Amendment. *See Fuentes*, 407 U.S. at 90, n.22 ("A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. . . . But these rather ordinary costs cannot outweigh the constitutional right"); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971) ("Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement. . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process").

* * *

Dated: August 30, 1993

MORGAN, MELHUISH, MONAGHAN, ARVIDSON, ABRUTYN & LISOWSKI

Of Counsel:
Elliott Abrutyn, Esq.

Attorneys for Defendant-Respondent General Accident Insurance Company of America

Respectfully submitted,

MUDGE ROSE GUTHRIE ALEXANDER & FERDON

By /s/ Cary Edwards
W. Cary Edwards

Of Counsel:
Paul R. Koepff
John L. Altieri, Jr.
Stephen V. Kovarik

Attorneys for Defendant-Respondent Insurance Company of North America

CHASAN, LAYNER, TARRANT & LAMPARELLO

Of Counsel:
Donald F. Stevens

HASKELL & PERRIN

Of Counsel:
Daniel P. Caswell
Teresa Rooney Williams

Attorneys for Defendant-Respondent Continental Casualty Company

DECOTIIS & PINTO

Of Counsel:
James A. Farber
Michael G. Luchkiw

SIFF ROSEN, P.C.

Of Counsel:
Robert F. Walsh
Louis G. Adolfsen

Attorneys for Defendant-Respondent First State Insurance Company

ROBINSON, ST. JOHN & WAYNE

Of Counsel:
Karol Korbin

JACKSON & CAMPBELL, P.C.

Of Counsel:
Robert N. Kelly
Richard F. Kuho

Attorneys for Defendant-Respondent American Home Assurance Company

MANTA & WELGE

Of Counsel:
John C. Sullivan

Attorneys for Defendant-Respondent Liberty Mutual Insurance Company

APPENDIX P

SUPREME COURT OF NEW JERSEY

DOCKET NO. 34,341

MORTON INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, et al.,

Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY ON MOTIONS FOR RECONSIDERATION

ARGUMENT

POINT I

AN INQUIRY INTO THE MENTAL PROCESSES OF THE REGULATORS WOULD BE INCONCLUSIVE AT BEST DUE TO THE UNAVAILABILITY OF KEY DECISION-MAKERS AND THE PASSAGE OF TIME

* * *

The recommendation to approve the exclusion came from Rate Analyst William J. Gough and the Rating Division Chief Charles L. Maier. Sa112*. One of these two

---

*The Appendix submitted by the State of New Jersey and accepted by this Court as part of the record in its July 21, 1993 order will be cited as Sa, followed by the page number.

individuals signed all of the correspondence in the Department of Insurance file relative to the pollution exclusion submitted by the State of New Jersey with its brief on October 28, 1992. Sa92-Sa116. Mr. Gough and Mr. Maier were also responsible for the bulk of the memoranda and correspondence in the documents submitted by *amicus curiae* New Jersey State League of Municipalities on or about November 25, 1992 with the Certification of David Garfield Roland (Roland Certification) stating he had found these documents in Department of Insurance files at an earlier date. The only items that were signed by others were the half page memorandum by Jerome Steen (Exhibit D), the memorandum of Walter R. Davis Jr. (Exhibit M) and the order by W. Morgan Shumake approving the pollution exclusion. (Exhibit P). If the Commissioner delegated the evaluation of the pollution exclusion to anyone, he delegated it to Mr. Maier and Mr. Gough, based on the recommendation endorsed by these two individuals. Sa112. The record suggests then-Commissioner Clifford had minimal involvement in the review and approval of the exclusion.

Mr. Maier and Mr. Gough are deceased so they are unavailable to testify to their thoughts leading to their recommendation to approve the pollution exclusion. Mr. Shumake is also deceased. Without their testimony, any inquiry into what the regulators were thinking in 1971, to counter the misleading explanation by the insurers, would be, at best, inconclusive. At worst, Mr. Steen's speculations twenty-three years later, as to what Mr. Maier and Mr. Gough were thinking, would become the

sole basis for overturning this Court's well considered, thorough opinion.*

* * *

Respectfully,

FRED DeVESA
ACTING ATTORNEY GENERAL
OF NEW JERSEY

By: /s/ Karen L. Jordan
Karen L. Jordan
Deputy Attorney General

Dated:
[December 15, 1993]

*Mr. Davis is still living, though no longer employed by the Department of Insurance. Any testimony he could give would be subject to the same limitations as he was not a decisionmaker.